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When Do the Ends Justify the Means?: The Role of the Necessary and Proper Clause in the Commerce Clause Analysis

David Loudon

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When Do The Ends Justify The Means?: The Role of The Necessary And Proper Clause In The Commerce Clause Analysis

David Loudon

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ABSTRACT

This Article discusses the interplay between the Necessary and Proper Clause and the Commerce Clause, particularly in light of the landmark decision of *National Federation of Independent Business v. Sebelius*. First, this Article reviews the historical interaction between the two clauses, discussing the instances in which the two may have been considered together, and introducing the Supreme Court jurisprudence of each clause, setting the legal landscape for the *NFIB v. Sebelius* decision. Next, this Article details the three opinions from the *NFIB v. Sebelius* decision, Chief Justice Roberts' holding, the joint concurrence, and Justice Ginsberg's dissent, specifically as they relate to the interaction between the Commerce Clause and the Necessary and Proper clause. This Article continues by exploring the different theories of constitutional interpretation reflected in the three *NFIB v. Sebelius* opinions. Finally, this Article concludes by proposing a "Means-Ends Framework" to govern the relationship between the two clauses. This framework proposes that a federal regulation of intrastate activity is only permissible when it serves as a means to an effective regulation of interstate commerce, and not as additional end that is outside of Congress's enumerated powers.

AUTHOR NOTE

Term Law Clerk 2015-16, Magistrate Judge Mark Dinsmore, Indianapolis, IN; J.D. 2015, Michigan State University College of Law; B.A. 2011, American University. I would like to thank everybody who helped me during the long process of writing and editing this article. Specifically, I would like to thank Alan Battista and all the members of the 2014-15 *University of Massachusetts Law Review* for agreeing to publish this article and for all their hard work editing it, Professor Phil Pucillo for inspiring this article as my constitutional law professor and for his extensive comments on it, and the 2013-14 *Michigan State Law Review* editorial board for reviewing the early drafts of this article and considering it for publication. Additionally, I would like to personally thank my best friend and roommate Blane Stanaland for his kindness and friendship during law school, and my mom, Kay Loudon, for her all of her support and love throughout the years.

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I. INTRODUCTION

Suppose that Congress decides tomorrow that more needs to be done to deal with the problem of childhood obesity.¹ As part of a comprehensive plan to deal with the growing epidemic, Congress passes the “Child Food and Health Safety Act.”² The Act provides, among other provisions, that children under the age of eighteen may not “buy, possess, or consume” any soft drink larger than sixteen ounces. Coca-Cola Inc., threatened with a decrease in profits, challenges this provision,³ arguing that it is outside Congress’s enumerated powers.⁴ Would this act be a constitutional exercise of Congress’s legislative authority?

The government would likely support this statute under Congress’s authority “[t]o regulate Commerce . . . among the several states.”⁵ The federal government, since the ratification of the Constitution, has been universally acknowledged to be one of limited and enumerated powers.⁶ In contrast to the states, which have a general police power,⁷

¹ See generally Sabrina Tavernise, *Obesity in Young Is Seen as Falling in Several Cities*, N.Y. TIMES (Dec. 10, 2012), <http://www.nytimes.com/2012/12/11/health/childhood-obesity-drops-in-new-york-and-philadelphia.html>.

² This is a fictitious act created for hypothetical purposes inspired by New York City’s ban on restaurants selling any soft drinks larger than sixteen ounces. See Michael M. Grynbaum, *New York Plans to Ban Sale of Big Sizes of Sugary Drinks*, N.Y. TIMES (May 30, 2012), <http://www.nytimes.com/2012/05/31/nyregion/bloomberg-plans-a-ban-on-large-sugared-drinks.html>.

³ Assume for the sake of this hypothetical that Coca-Cola has standing to challenge the provision.

⁴ See U.S. CONST. art. I, § 1 (giving Congress “all legislative Powers *herein granted*”) (emphasis added); see also U.S. CONST. art. I, § 8 (listing the legislative powers granted to Congress); U.S. CONST. amend. X. (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

⁵ U.S. CONST. art. I, § 8, cl. 3. This clause of the Constitution is commonly referred to as the “Commerce Clause.”

⁶ See note 4 and provisions cited therein; see e.g., *McCulloch v. Maryland*, 17 U.S. 316, 405 (1819) (“This government is acknowledged by all, to be one of enumerated powers.”); *NFIB v. Sebelius*, 132 S. Ct. 2566, 2577 (2012) (opinion of Roberts, J.) (“In our federal system, the National Government possesses only limited powers . . . the Constitution lists, or enumerates, the Federal Government’s powers.”); *United States v. Lopez*, 514 U.S. 549, 552 (1995) (“[t]he Constitution creates a Federal Government of enumerated powers.”).

the federal government only has the powers explicitly granted to it in the Constitution.⁸ During the New Deal era, the Court expansively interpreted Congress's authority under the Commerce Clause, giving Congress broad leeway in using its powers.⁹ However, in the last twenty years, the Court has moved toward a more limited view of Congress's commerce power.¹⁰ Would the "Child Food Health and Safety Act" survive constitutional scrutiny under this narrower view?

To begin, the Court would likely apply the traditional three-category Commerce Clause framework that it has recited regularly in its Commerce Clause cases.¹¹ However, that would not be the end of the analysis. The Court's recent decision in *National Federation of Independent Business v. Sebelius* (hereinafter "*NFIB v. Sebelius*") suggests that the Court would also conduct a separate inquiry into whether Congress has the power to enact the regulation under the "Necessary and Proper Clause," which gives Congress the power to "make all Laws which shall be necessary and proper for carrying into Execution" its enumerated powers.¹² After practically ignoring this clause throughout the development of its Commerce Clause

⁷ Although not always easy to define, generally the state "police power" has been recognized to include regulations for the public health, safety, morals, and welfare of its citizens. *Leisy v. Hardin*, 135 U.S. 100, 129 (1890) ("there seems to be no doubt that [the police power] does extend to the protection of the lives, health, and property of the citizens, and to the preservation of good order and the public morals."). *But see generally* Santiago Legarre, *The Historical Background of the Police Power*, 9 U. PA. J. CONST. L. 745 (2007) (describing the Court's use of narrow and broad definitions of the term "police power" throughout its jurisprudence). For practical purposes, this means that state governments may pass any law that it deems to be in the best interests of its citizens unless that law conflicts with an express prohibition in the Constitution. *NFIB*, 132 S. Ct. at 2578.

⁸ See note 6 and cases cited therein.

⁹ See *infra* Part II.B.1 (describing the expansion of Congress's commerce power during the New Deal).

¹⁰ See *infra* Part II.B.2 (describing the Court's attempts to limit Congress's authority under the Commerce Clause).

¹¹ *Gonzales v. Raich*, 545 U.S. 1, 16 (2005) (identifying the "three general categories of regulation in which Congress is authorized to engage under its commerce power" as (1) regulating the channels of interstate commerce; (2) regulating the instrumentalities of interstate commerce; and (3) regulating activities that have a substantial effect on interstate commerce).

¹² U.S. CONST. art. I, § 8, cl. 18. This clause is commonly referred to as the "Necessary and Proper Clause."

jurisprudence, the Court in *NFIB v. Sebelius* put the clause into the equation.¹³

The apparent emergence of the Necessary and Proper Clause as an independent justification for federal economic regulations raises important questions about the scope of federal power. What role should the Necessary and Proper Clause play in the Court's analysis in future Commerce Clause cases?¹⁴ Will the clause be used to extend federal power¹⁵ or to re-assert its limits?¹⁶ Is it implicitly included in the current Commerce Clause jurisprudence, or is it an additional extension of federal power?¹⁷ If it is an additional extension, what does it add to the analysis?¹⁸

This Article argues that the views of the justices in *NFIB v. Sebelius* fail to provide an adequate framework for applying the Necessary and Proper Clause in relation to the Commerce Clause. Instead, the Court should focus on ensuring that the Necessary and Proper Clause provides "means" to regulate interstate commerce, rather than an additional enumerated power.¹⁹ The Necessary and Proper Clause gives Congress the authority to regulate intrastate activities only when the regulation is used as a "means" to regulate

¹³ All three opinions specifically addressed the Necessary and Proper Clause. Furthermore, both Chief Justice Roberts's opinion and Justice Ginsburg's opinion analyzed the regulation separately under both the Commerce Clause and the Necessary and Proper Clause. *NFIB v. Sebelius*, 132 S. Ct. 2566, 2591-93 (2012) (opinion of Roberts, J.); *id.* at 2646-47 (Scalia, Kennedy, Thomas, Alito, JJ., concurring in part); *id.* at 2625-26 (Ginsburg, J., dissenting in part); *see infra* Part III. This is in contrast to the Court's prior Commerce Clause cases, in which the Court either omitted the Necessary and Proper Clause entirely, or mentioned it only briefly. *See infra* Part II.B.

¹⁴ *See infra* Part V (proposing the "Means-Ends Framework" for the relationship between the Necessary and Proper Clause and the Commerce Clause).

¹⁵ *See infra* Part IV.A (discussing the "expansive approach" to Congress's commerce power).

¹⁶ *See infra* Part IV.B (discussing the "limiting approaches" to Congress's commerce power).

¹⁷ *See infra* Part V.

¹⁸ *See infra* Part V.

¹⁹ J. Randy Beck, *The New Jurisprudence of the Necessary and Proper Clause*, 2002 U. ILL. L. REV. 581, 584 (arguing that the Necessary and Proper Clause "should . . . be understood to regulate the relationship between congressional means and constitutional ends").

interstate commerce.²⁰ In order to ensure that intrastate regulations serve only as a means and not an end, the Court should hold that an intrastate regulation is necessary and proper only if the regulation is substantially related to a larger economic scheme that predominates over the individual regulation.²¹ This view of the interaction between the Commerce and Necessary and Proper Clauses is consistent with the language of the Necessary and Proper Clause and strikes the proper balance, by giving Congress flexibility to fix the means of enforcing its commerce power, while denying it the police power reserved to the states.

Part II discusses the history of the Commerce and Necessary and Proper Clauses and how the Court has treated the interaction between the two. Part III examines the different opinions from *NFIB v. Sebelius*, applying the Necessary and Proper Clause to the individual mandate. Part IV examines the Court's competing theories from *NFIB v. Sebelius* on the relationship between the Commerce Clause and Necessary and Proper Clause. Finally, Part V proposes a "Means-Ends Framework" for the relationship between the Necessary and Proper Clause and the Commerce Clause, and discusses how this framework could be applied in future cases.

II. CONGRESSIONAL POWER UNDER THE COMMERCE CLAUSE

Both the Court's Necessary and Proper Clause jurisprudence and Commerce Clause jurisprudence have created a broad, although limited, scope of federal power.²² However, the Court has rarely addressed the relationship between the two clauses, creating uncertainty about the true extent of federal power.²³ Nevertheless, two common themes emerge from the case law: (1) the Justices are split in their opinion as to whether a "rational relationship" between a

²⁰ See *Gonzales v. Raich*, 545 U.S. 1, 34 (2005) (Scalia, J., concurring); see *infra* Part V.

²¹ See *infra* Part V.A (describing in more detail the three-part test proposed in this article).

²² See *infra* Part II.A (describing the significant leeway the Court has provided Congress under the Necessary and Proper Clause to choose the means to enforce its enumerated powers); see *infra* Part II.B (describing the broad authority the Court has provided Congress under the Commerce Clause to regulate economic or commercial activities that have a substantial effect on interstate commerce).

²³ See *infra* Part II.B.

regulation and an enumerated power is sufficient to survive constitutional scrutiny²⁴ and (2) intrastate regulations have only been upheld when they are part of a larger statutory scheme that regulates interstate commerce.²⁵

A. The Necessary and Proper Clause

The Necessary and Proper Clause applies not only to Congress's commerce power, but to all of its enumerated powers.²⁶ The Court's application of the Necessary and Proper Clause in other contexts will help guide the Court in defining its relationship to the Commerce Clause. Any analysis of the role of the Necessary and Proper Clause in the United States' constitutional jurisprudence must start with an examination of Chief Justice Marshall's landmark opinion in *McCulloch v. Maryland*.²⁷ In *McCulloch*, the Court addressed the much-debated constitutional issue of whether the federal government had the power to incorporate a bank.²⁸ The creation and chartering of a bank is not explicitly mentioned among Congress's enumerated powers, so the only way that Congress could exercise that authority would be if the act of creating and chartering a bank was implied from its power under the Necessary and Proper Clause.²⁹ Ultimately, the Court upheld the incorporation of the national bank as necessary and proper to the execution of Congress's enumerated powers.³⁰

The Court rejected Maryland's argument that the Necessary and Proper Clause is not an expansive clause, but a limiting one, restricting Congress's power to pass only those laws that are absolutely necessary

²⁴ See text accompanying notes 45-57, 112, 114-16, 151-54.

²⁵ See text accompanying notes 65, 101, 129-32, 148-49.

²⁶ U.S. CONST. art. I, § 8, cl. 18 (giving Congress the authority to "make all laws which shall be necessary and proper for carrying into Execution" its enumerated powers).

²⁷ *McCulloch v. Maryland*, 17 U.S. 316 (1819).

²⁸ *Id.* at 401 ("[H]as congress power to incorporate a bank?"); see also Keith Werhan, *Checking Congress and Balancing Federalism: A Lesson from Separation-of-Powers Jurisprudence*, 57 WASH & LEE L. REV. 1213, 1228 (2000) (describing the controversy over whether the incorporation of a bank was within Congress's authority as a "longstanding controversy").

²⁹ Werhan, *supra* note 28, at 1228 (noting that "the framers had not explicitly included [the power to incorporate a bank] in the Article I, Section 8 delineation of congressional authority"); U.S. CONST. art. I, § 8.

³⁰ *McCulloch*, 17 U.S. at 424.

for the execution of its enumerated powers.³¹ According to the Court, the Constitution gives Congress “great powers” to execute, and “[i]t can never be [the Framers’] interest, and cannot be presumed to have been their intention, to clog and embarrass [their] execution, by withholding the most appropriate means.”³² As such, the Court defined the word “necessary” as something “convenient or useful,” rather than something “absolutely necessary.”³³ Therefore, because the incorporation of a national bank was “convenient” and “useful” toward the execution of Congress’s enumerated powers,³⁴ it was constitutional under the Necessary and Proper Clause.³⁵

McCulloch stands for the general proposition that the Necessary and Proper Clause provides Congress with significant leeway to choose the means to enforce its enumerated powers, even means that are not “absolutely necessary” for their enactment.³⁶ However, Chief Justice Marshall did not address head-on the tension between his observation that “[t]his government is acknowledged by all, to be one

³¹ *Id.* at 412-13.

³² *Id.* at 407-08. The Court later added that a restrictive interpretation of the Necessary and Proper Clause would severely restrict the powers of the national government and therefore be “pernicious in its operation.” *Id.* at 416.

³³ *Id.* at 413. In addition to its argument that a narrow interpretation of the Necessary and Proper Clause would undermine Congress’s ability to govern the nation, the Court also put forward numerous textual arguments to support its broad interpretation. First, the Court noted that the phrase “absolutely necessary” appears in another provision of the Constitution. *Id.* at 414. The fact that the framers chose not to use that language in Article I Section 8 suggests that they did not intend a narrow interpretation of Congressional authority. *Id.* The Court further argued that the inclusion of the word “proper” with “necessary” indicated that the framers meant to “to qualify [a] strict and rigorous” interpretation of the clause. *Id.* at 418-419. Finally, the Court noted that the Necessary and Proper Clause was located in the Constitution among Congress’s powers, further indicating that the Necessary and Proper Clause was intended to expand federal authority, not limit it. *Id.* at 419.

³⁴ *Id.* at 422 (“That [a national bank] is a convenient, a useful, and essential instrument in the prosecution of [the federal government’s] fiscal operations, is not now a subject of controversy.”).

³⁵ *Id.* at 424.

³⁶ Werhan, *supra* note 28, at 1226-28 (arguing that Chief Justice Marshall’s interpretation of the Necessary and Proper Clause was broad); see Beck, *supra* note 19, at 601 (arguing that in *McCulloch*, “Marshall emphasized the federal government’s need for ample means to accomplish its delegated objects.”); see also text accompanying notes 31-35.

of enumerated powers”³⁷ and his belief that Congress has discretion to choose the proper means.³⁸ Perhaps the closest Chief Justice Marshall comes to addressing the outer limits of the necessary and proper power is with his famous quote, “[l]et the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional.”³⁹ This framework, while a good starting point, leaves significant questions to be answered by future cases. What makes a particular means “appropriate” for Congress to promulgate? How tight of a fit is required between the means and the enumerated power to make it “plainly adapted?” What means are prohibited by the “spirit of the constitution?” Ultimately, *McCulloch* left the Court with two competing propositions, that the power of the federal government is clearly circumscribed to those listed in the Constitution, and that Congress has wide flexibility to choose the means to enforce those powers.⁴⁰

Nearly 200 years after *McCulloch*, the Court is still struggling to reconcile these competing propositions. In the 2010 case, *United States v. Comstock*,⁴¹ the issue was whether the federal government had the authority to involuntarily detain sexually dangerous federal prisoners after those prisoners have completed their sentences.⁴² The Justices essentially conceded that the detainment was not directly related to an enumerated power,⁴³ but nevertheless upheld the

³⁷ *McCulloch*, 17 U.S. at 405.

³⁸ Chief Justice Marshall hints at the potential conflict when he states that “[i]t is . . . the subject of fair inquiry, how far such means may be employed,” but he does not answer this question in his opinion. *Id.* at 409.

³⁹ *Id.* at 421.

⁴⁰ *Id.* at 405, 413.

⁴¹ *United States v. Comstock*, 560 U.S. 126 (2010).

⁴² *Id.* at 129-30.

⁴³ While not explicitly stated, the majority, concurring and dissenting opinions were all based on the idea that there was not a direct link between the authority and an enumerated power. *See id.* at 146 (“[T]he links between [the statute] and an enumerated Article I power are not too attenuated.”); *id.* at 150 (Kennedy, J., concurring in the judgment) (“Respondents argue that congressional authority under the Necessary and Proper Clause can be no more than one step removed from an enumerated power. This is incorrect . . . the analysis depends not on the number of links in the congressional-power chain but on the strength of the

regulation by a 7-2 vote.⁴⁴ The five-Justice majority emphasized the broad power that Congress possesses under the Necessary and Proper Clause,⁴⁵ articulating the standard as whether “the statute constitutes a means that is *rationally related* to the implementation of a constitutionally enumerated power.”⁴⁶ Since the link “between [the statute] and an enumerated Article I power was not too attenuated,” the Court held that the statute was within Congress’s authority under the Necessary and Proper Clause.⁴⁷ Thus, the majority applied a rational-basis standard and found the regulation constitutional.⁴⁸

Justices Alito and Kennedy concurred in the judgment, but rejected the majority’s use of rational-basis review.⁴⁹ Both concurring opinions expressed concern with the “breadth of the [majority’s] language” in its opinion.⁵⁰ Justice Kennedy criticized the majority’s use of rational-basis review when analyzing Congress’s powers under the Necessary and Proper Clause,⁵¹ arguing that this standard is inappropriate in a case that involves “powers . . . confined by the principles that control

chain.”); *id.* at 159 (Thomas, J., dissenting) (“[T]he Necessary and Proper Clause empowers Congress to enact only those laws that ‘carr[y] into Execution’ one or more of the federal powers enumerated in the Constitution. Because [the statute] ‘execut[es]’ no enumerated power, I must respectfully dissent.”) (citation omitted); *see also* Ilya Somin, *Taking Stock of Comstock: The Necessary and Proper Clause and the Limits of Federal Power* 2010 CATO SUP. CT. REV. 239, 249 (noting that the majority opinion in *Comstock* does not show a direct connection between the statute and an enumerated power).

⁴⁴ *Comstock*, 560 U.S. at 128.

⁴⁵ *Id.* at 133. Justice Breyer wrote the opinion of the Court, which was joined by Justices Stevens, Ginsburg, Sotomayor, and Chief Justice Roberts. *Id.* at 128.

⁴⁶ *Id.* at 134 (emphasis added).

⁴⁷ *Id.* at 146. The Court also stated three other main reasons for finding that the statute was within Congress’s authority under the Necessary and Proper Clause. The Court noted that the government’s extension of power in this case: (1) was a “modest” extension to one it already exercised; (2) was “reasonable;” and (3) properly accounted for state interests. *Id.* at 137, 142-43.

⁴⁸ *Id.* at 134, 146.

⁴⁹ *Id.* at 150 (Kennedy, J., concurring in the judgment); *id.* at 155 (Alito, J., concurring in the judgment).

⁵⁰ *Id.* at 155 (Alito, J., concurring in the judgment); *id.* at 154 (Kennedy, J., concurring in the judgment) (arguing that “[T]he [majority opinion] ignores important limitations stemming from federalism principles.”).

⁵¹ *Id.* at 151-52 (Kennedy, J., concurring in the judgment); Somin, *supra* note 43, at 245 (noting that in *Comstock* “Kennedy argued against the use of the ‘rational basis’ test adopted by the majority”).

the limited nature of our National Government.”⁵² Similarly, Justice Alito implicitly attacked the majority’s use of rational-basis review.⁵³ In support of his position that the statute in question was constitutional, Justice Alito argued that “[t]his is not a case in which it is merely possible for a court to think of a rational basis on which Congress might have perceived an attenuated link between” the means and an enumerated power.⁵⁴ While Justices Kennedy and Alito joined the majority’s judgment, they both expressed concerns about the majority’s use of a lenient rational-basis review.⁵⁵

Comstock did not involve the Commerce Clause, so it is unclear if its holding would affect the traditional Commerce Clause analysis. Even if the exact analysis employed by the Justices in *Comstock* would not be relevant to a Commerce Clause case, the case offers a key insight into their views on the Necessary and Proper Clause generally.⁵⁶ Despite the majority’s application of a lenient rational-basis review for statutes supported by the Necessary and Proper Clause, the Court was divided as to whether a more stringent review should be required.⁵⁷ Thus, the Court is currently divided as to how strong of a connection is required between the means and an

⁵² *Comstock*, 560 U.S. at 151 (Kennedy, J., concurring in the judgment). Justice Kennedy proposed instead that the Court should apply a heightened rational-basis review that requires a “demonstrated link in fact, based upon empirical demonstration” in order to support a law under the Necessary and Proper Clause. *Id.* at 152.

⁵³ *Id.* at 155-58 (Alito, J., concurring in the judgment).

⁵⁴ *Id.* at 158. Justice Alito wrote on the topic of the Necessary and Proper Clause in general that “[a]lthough the term ‘necessary’ does not mean ‘absolutely necessary’ or indispensable, the term requires an ‘appropriate’ link between a power conferred by the Constitution and the law enacted by Congress.” *Id.* This also suggests that Justice Alito supports the idea that a standard more stringent than rational-basis is required in necessary and proper cases.

⁵⁵ *Id.* (Alito, J., concurring in the judgment); *id.* at 151-52 (Kennedy, J., concurring in the judgment).

⁵⁶ See text accompanying note 57-58.

⁵⁷ While Justices Scalia and Thomas did not attack the rational-basis standard directly in their dissent, both attacked it in a prior case relating to the Commerce Clause. See e.g., *Gonzales v. Raich*, 545 U.S. 1, 36 (2005) (Scalia, J., concurring in the judgment); *id.* at 61 (Thomas, J., dissenting). Furthermore, while Chief Justice Roberts signed on to the opinion in full, indicating that he also supported the majority’s rational-basis review, *Comstock*, 560 U.S. at 128, his subsequent opinion in *NFIB v. Sebelius* suggests that Roberts may not be completely supportive of the majority’s lenient standard of review. See *infra* Part III.A.

enumerated end to justify a regulation under the Necessary and Proper Clause.⁵⁸

B. The Commerce Clause

The Necessary and Proper Clause has played an important, if often unexamined, role in the Court's expansion of Congress's commerce power.⁵⁹ Over time, the Court has developed a three-category framework for analyzing Congress's power under the Commerce Clause.⁶⁰ A regulation is constitutional under the Commerce Clause if it regulates, (1) the channels of interstate commerce, (2) the instrumentalities of interstate commerce, or (3) economic or commercial intrastate activities that, in the aggregate, have a substantial effect on interstate commerce.⁶¹ The influence of the Necessary and Proper Clause on the Court's Commerce Clause jurisprudence becomes apparent when the Court started to uphold regulations of purely intrastate activities that had a substantial effect on interstate commerce.⁶² However, while the Court at times used the language associated with the Necessary and Proper Clause, or briefly mentioned that the clause was relevant, there was no extended discussion on the precise role that the clause played until Justice Scalia's concurrence in *Gonzales v. Raich*.⁶³ As such, it is unclear whether the Necessary and Proper Clause is already incorporated in the traditional Commerce Clause analysis, or whether it constitutes an independent justification for Congressional regulation of economic activities.

1. The Expansion of the Commerce Power

The Court's first clear indication that the Necessary and Proper Clause affected the Court's analysis in a Commerce Clause case came

⁵⁸ See text accompanying notes 46-57.

⁵⁹ See *infra* Part II.B.1-2.

⁶⁰ See *Raich*, 545 U.S. at 33 (Scalia, J., concurring in the judgment) (noting that “[s]ince . . . [1971], our cases have mechanically recited that the Commerce Clause permits congressional regulation of three categories”).

⁶¹ *Id.*; see *infra* Part II.B.1-2.

⁶² See *infra* Part II.B.1.

⁶³ See *infra* Part II.B.1-3.

in the 1941 case, *United States v. Darby*.⁶⁴ The issue in *Darby* was whether Congress, as part of a “comprehensive legislative scheme,”⁶⁵ had the power to prohibit the shipment in interstate commerce of goods manufactured by workers whose employers did not comply with the maximum hours and minimum wage laws prescribed by Congress.⁶⁶ The Court first held that the regulation was constitutional because it regulated an item that moved through interstate commerce.⁶⁷ The Court went on to hold that Congress’s regulation on manufacturing would be constitutional even *without* the requirement that the goods enter interstate commerce.⁶⁸

The Court, using the language from *McCulloch*, held that Congress’s commerce power included purely intrastate activities that affect interstate commerce.⁶⁹ The Court held that Congress’s authority “extends to those activities intrastate which so affect interstate commerce. . . as to make regulation of them *appropriate means to the attainment of a legitimate end*, the exercise of the granted power of Congress to regulate interstate commerce.”⁷⁰ The Court used similar language when it held that Congress “may choose the means *reasonably adapted* to the attainment of the permitted end, even

⁶⁴ *United States v. Darby*, 312 U.S. 100 (1941); Beck, *supra* note 19, at 617-19 (arguing that the Court relied on *McCulloch* and the Necessary and Proper Clause in upholding the statute in *Darby*).

⁶⁵ *Darby*, 312 U.S. at 109. While the Court in *Darby* did not mention this as a factor in its decision, this distinction becomes crucial in future commerce clause cases, in which the Court held regulations unconstitutional in part because they were not part of a larger economic scheme. *See e.g.*, *United States v. Lopez*, 514 U.S. 549, 562 (1995); *see infra* Part II.B.2.

⁶⁶ *Darby*, 312 U.S. at 105.

⁶⁷ The Court reasoned that “[T]he power of Congress under the Commerce Clause is plenary to exclude any article from interstate commerce subject only to the specific prohibitions of the Constitution.” *Id.* at 116.

⁶⁸ *Id.* at 122. This holding is arguably dictum since the Court had already held that the act was constitutional because it regulated items that went through interstate commerce. *Id.* at 116. Nevertheless, this holding was highly influential and followed by subsequent Court decisions. *See infra* Part II.B.1 (describing the *Wickard* Court’s adoption of this holding from *Darby*).

⁶⁹ *See* text accompanying notes 70-72.

⁷⁰ *Darby*, 312 U.S. at 118 (emphasis added). *Compare Darby*, 312 U.S. at 118, with *McCulloch*, 17 U.S. at 408 (writing that “[i]t can never be [the Framers’s] interest, and cannot be presumed to have been their intention, to clog and embarrass its execution, by withholding the most *appropriate means*” to effectuate Congress’s enumerated powers) (emphasis added).

though they involve control of intrastate activities”⁷¹ and that “[t]he means adopted by [the act] . . . is so related to the commerce and so affects it as to be within the reach of the commerce power.”⁷² Thus, the Court held that Congress may regulate purely intrastate activities as a “means” to enforce its commerce power.⁷³ Despite the Court’s use of Necessary and Proper Clause language, it did not once mention the clause in its analysis, instead relying solely on the Commerce Clause in reaching its decision.⁷⁴ Nevertheless, it is clear that the principles of the clause, as enunciated in *McCulloch*, buttressed the Court’s expansion of the Commerce Clause to include purely intrastate activities.⁷⁵

In *Wickard v. Filburn*,⁷⁶ a case that “has long been regarded as ‘perhaps the most far reaching example of Commerce Clause Authority of intrastate activity,’”⁷⁷ the Court completed its expansion of Congress’s power under the Commerce Clause. In *Wickard*, the Court held that the federal government could limit the amount of wheat that a farmer produced even if the wheat never entered interstate commerce.⁷⁸ The Court began its analysis in *Wickard* by affirming the principle enunciated in *Darby*, that Congress’s commerce power includes the ability to regulate intrastate activities that have a

⁷¹ *Darby*, 312 U.S. at 121 (emphasis added). Compare *Darby*, 312 U.S. at 121, with *McCulloch*, 17 U.S. at 421 (“Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are *plainly adapted* to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”) (emphasis added).

⁷² *Darby*, 312 U.S. at 123.

⁷³ See text accompanying notes 70-72.

⁷⁴ *Darby*, 312 U.S. at 123 (“The means adopted by [the act] . . . are so related to the commerce and so affects it as to be within the reach of the commerce power.”).

⁷⁵ See text accompanying notes 70-72; see also Beck, *supra* note 19, at 617-19 (arguing that the Court relied on *McCulloch* and the Necessary and Proper Clause in upholding the statute in *Darby*).

⁷⁶ *Wickard v. Filburn*, 317 U.S. 111 (1942).

⁷⁷ *NFIB v. Sebelius*, 132 S. Ct. 2566, 2588 (2012) (quoting *United States v. Lopez*, 514 U.S. 549, 560 (1995)).

⁷⁸ *Wickard*, 317 U.S. at 113-17. The Court addresses the issue squarely when it acknowledged that “the [issue] would merit little consideration . . . except for the fact that this Act extends federal regulation to production not intended in any part for commerce but wholly for consumption on the farm.” *Id.* at 118.

substantial effect on interstate commerce.⁷⁹ The Court rejected the use of “mechanical applications of legal formulas,” that prohibited regulations with “indirect” effects or that involved only “production.”⁸⁰ Instead, it held that Congress had the authority under the Commerce Clause to regulate *any* activity that had a substantial effect on interstate commerce.⁸¹

The Court then took the analysis one step further, concluding that when determining whether an activity has a substantial effect on interstate commerce, the activity must be viewed in the aggregate, not on the effect of one occurrence.⁸² Although Mr. Filburn’s activities alone may not substantially affect the interstate market for wheat, “his contribution, taken together with that of many others similarly situated, is far from trivial.”⁸³ The Court reasoned that the farmer’s production of his own wheat, combined with the potential production of others, substantially affects interstate commerce.⁸⁴ As a result, the Court held that Congress may, under the Commerce Clause, regulate the farmer’s wheat production, regardless of whether that wheat actually entered interstate commerce.⁸⁵

In sum, the *Wickard* Court concluded that Congress could regulate *any* intrastate activity that, considered in the aggregate, had a substantial effect on interstate commerce.⁸⁶ This formulation of Congress’s power under the Commerce Clause pushed the line toward

⁷⁹ *Id.* at 124, (concluding that Congress’s commerce power “extends to those intrastate activities which in a substantial way interfere with or obstruct the exercise of” interstate commerce); *see* text accompanying notes 68-69.

⁸⁰ *Wickard*, 317 U.S. at 124. The Court further reasoned that “‘commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business.’” *Id.* at 122 (quoting *Swift & Co. v. United States*, 196 U.S. 375, 398 (1905)).

⁸¹ *Id.* at 124-25 (“[E]ven if appellee’s activity be local and though it may not be regarded as commerce, it may still, *whatever its nature*, be reached by Congress if it exerts a substantial economic effect on interstate commerce.”) (emphasis added).

⁸² *Id.* at 128.

⁸³ *Id.* Growing wheat at home would allow farmers to forgo purchasing wheat from the market, decreasing the amount of wheat sold in commerce. *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at 127-29.

⁸⁶ *See* text accompanying notes 79-81.

the creation of a national police power.⁸⁷ Ironically, the Court created such a broad formulation without reference to the Necessary and Proper Clause. The Court only mentions the Necessary and Proper Clause once in the entire opinion, in the context of stating one of the government's arguments supporting the constitutionality of the regulation.⁸⁸ Furthermore, unlike the Court in *Darby*,⁸⁹ the Court in *Wickard* did not use the language of "necessary and proper" in its decision, but instead relied solely on the Commerce Clause and its own precedent.⁹⁰ Thus, it is unclear what role, if any, the Necessary and Proper Clause played in the Court's decision.

2. The Backlash

For the next five decades, the Court consistently used this broad formulation of federal power from *Wickard* to uphold regulations under the Commerce Clause.⁹¹ However, the Court "shocked the legal community"⁹² with its 1995 decision in *United States v. Lopez*⁹³ and

⁸⁷ See e.g., Lawrence B. Solum, *How NFIB v. Sebelius Affects the Constitutional Gestalt*, 91 WASH. U.L. REV. 1, 3 & n.9 (2013) (citing numerous law review articles that characterized that Court's commerce clause authority after *Wickard* as unlimited); Kathleen A. Burdette, *Making Parents Pay: Interstate Child Support Enforcement After United States v. Lopez*, 144 U. PA. L. REV. 1469, 1477 (1996) ("Since the New Deal, Congress has had virtually unlimited power to regulate under the Commerce Clause."); Arthur B. Mark, III, *Currents in Commerce Clause Scholarship Since Lopez: A Survey*, 32 CAP. U. L. REV. 671, 679-80 (2004) ("In *Wickard*, the Court approved Congress's use of a virtually unlimited power under the Commerce Clause over intrastate activity.").

⁸⁸ *Wickard*, 317 U.S. at 119 ("[T]he Government argues that the statute . . . is sustainable as a 'necessary and proper' implementation of the power of Congress over interstate commerce."). Despite mentioning the argument in the opinion, the Court never directly responds to it.

⁸⁹ See text accompanying notes 70-72 (describing the *Darby* Court's use of the Necessary and Proper Clause language from *McCulloch* in affirming a congressional regulation of intrastate manufacturing).

⁹⁰ *Wickard*, 317 U.S. at 122-30.

⁹¹ See e.g., *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Perez v. United States*, 402 U.S. 146 (1971); *Hodel v. Va. Surface Mining & Reclamation*, 452 U.S. 264 (1981); see also A. Christopher Bryant, *The Third Death of Federalism*, 17 CORNELL J.L. & PUB. POL'Y 101, 138 (2007) (noting that "[b]etween 1936 and 1995, the Court upheld every federal statute regulating private conduct challenged as beyond Congress's power under the Commerce Clause").

⁹² Bryant, *supra* note 91, at 138; Beck, *supra* note 19, at 615.

⁹³ *United States v. Lopez*, 514 U.S. 549 (1995).

2000 decision in *United States v. Morrison*.⁹⁴ In these landmark cases, the Court attempted to place limitations on Congress's commerce power that were consistent with precedent.⁹⁵ Specifically, the Court limited the intrastate activities Congress could regulate to economic activities, rejected an "attenuated" relationship between an intrastate activity and interstate commerce, and suggested that intrastate regulations were only permissible if part of a larger statutory scheme.⁹⁶

In *Lopez*, the Court held that a federal statute banning the possession of a gun in a school zone was unconstitutional.⁹⁷ After recognizing that the Court's jurisprudence since *Darby* greatly expanded federal power,⁹⁸ the Court began to narrow that power without completely disregarding the framework that the Court had established.⁹⁹ The Court differentiated the current case from the Court's precedent, reasoning that the regulation "is a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms."¹⁰⁰ Similarly, unlike the regulations the Court had previously upheld, this regulation "is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated."¹⁰¹ Therefore, the Court differentiated this case from precedent because the activity regulated was not economic, and the statute was not part of a larger regulatory scheme.¹⁰²

⁹⁴ *United States v. Morrison*, 529 U.S. 598 (2000).

⁹⁵ *Bryant*, *supra* note 91, at 139.

⁹⁶ *See generally Lopez*, 514 U.S. 549; *Morrison*, 529 U.S. 598 (imposing limitations on Congress's authority to regulate intrastate activities under the Commerce Clause).

⁹⁷ *Lopez*, 514 U.S. at 552.

⁹⁸ *Id.* at 555-56.

⁹⁹ *Id.* at 558-59. The Court noted that "even . . . modern-era precedents which have expanded congressional power under the Commerce Clause confirm that this power is subject to outer limits." *Id.* at 556-57.

¹⁰⁰ *Id.* at 561. The Court also noted that "Even *Wickard*, which is perhaps the most far reaching example of Commerce Clause Authority over intrastate activity, involved economic activity in a way that the possession of a gun in a school zone does not." *Id.* at 560.

¹⁰¹ *Id.* at 561.

¹⁰² *Id.* at 560-62.

Next, the Court in *Lopez* considered the connection between possessing a gun in a school zone and interstate commerce.¹⁰³ The Court did not address whether Congress had a rational basis for finding that possession of a gun in a school zone would affect interstate commerce.¹⁰⁴ Instead, the Court reasoned that the government's argument—that guns around schools leads to crime, which ultimately affects interstate commerce—would, in effect, give Congress a police power.¹⁰⁵ To accept the Government's arguments of an effect on interstate commerce, the Court would have to “pile inference upon inference” in a way that would allow Congress to regulate any activity.¹⁰⁶ Thus, the Court implicitly rejected a lenient rational-basis review and held that the connection between the regulation and interstate commerce was too remote to support the regulation under the Commerce Clause.¹⁰⁷

Five years later in *United States v. Morrison*, the Court showed that the *Lopez* restrictions on Congress's Commerce Clause authority were here to stay.¹⁰⁸ *Morrison* involved a federal statute that provided “a federal civil remedy for victims of gender-motivated violence.”¹⁰⁹ Relying heavily on its reasoning from *Lopez*, the Court declared the law unconstitutional.¹¹⁰ In particular, the Court focused on the non-economic nature of the activity being regulated¹¹¹ and the attenuated

¹⁰³ *Id.* at 564 (“We pause to consider the implications of the Government's arguments.”).

¹⁰⁴ *See id.* at 564-66.

¹⁰⁵ *Id.* at 567 (arguing that the government's theory would “convert congressional authority under the Commerce Clause to a general police power”); *see also id.* at 564 (“[I]f we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.”).

¹⁰⁶ *Id.* at 567; *see* note 105.

¹⁰⁷ *Lopez*, 514 U.S. at 567.

¹⁰⁸ Bryant, *supra* note 91, at 145 (arguing that “the [*Morrison* decision] indicated that *Lopez* was not merely a solitary signal of the Court's displeasure with Congress's inattention to the limits on its own authority”).

¹⁰⁹ *Morrison*, 529 U.S. at 601.

¹¹⁰ *Id.* at 602. “Since *Lopez* most recently canvassed and clarified our case law governing this third category of Commerce Clause regulation, it provides the proper framework for conducting the required analysis of § 13981 [of the Violence Against Women Act].” *Id.* at 609.

¹¹¹ *Id.* at 613 (“Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity.”).

nature of the connection between gender-motivated violence and interstate commerce.¹¹² Thus, the Court in *Morrison* reinforced the limitations on Congress's Commerce Clause authority enunciated in *Lopez*, and held that the statute was unconstitutional.¹¹³

While the actual impact of *Lopez* and *Morrison* on subsequent lower court decisions has been arguably inconsistent,¹¹⁴ the Court was clearly attempting to limit any further expansion of congressional authority under the Commerce Clause. The Court limited the intrastate activities that Congress may regulate to economic or commercial activities.¹¹⁵ Additionally, the Court in both cases implicitly rejected rational-basis review and suggested that an attenuated connection between the regulation and interstate commerce was insufficient to support a regulation under the Commerce Clause.¹¹⁶ In neither case did the Court use the text of the Commerce Clause or the Necessary and Proper Clause to support these restrictions,¹¹⁷ but instead used a limiting reading of precedent¹¹⁸ and emphasized fears of creating a

¹¹² *Id.* at 615 (arguing that the link between gender-motivated violence and interstate commerce was so attenuated that allowing a regulation based on such a tenuous link would “obliterate the Constitution’s distinction between national and local authority”).

¹¹³ *Id.* at 602.

¹¹⁴ Mark A. Correro, *The Lopez/Morrison Limitation on the Commerce Clause - Fact or Fabrication?*, 14 DIGEST 17, 49 (2006) (“In some areas . . . the courts have severely limited the reach of the federal government by relying on *Lopez* and *Morrison*. In other areas . . . the courts have engaged in intellectual corruption in order to square the statute with the Constitution.”).

¹¹⁵ *See Morrison*, 529 U.S. at 611 (citing *United States v. Lopez*, 514 U.S. 549, 559-60 (1995)). However, the Court does not specifically delineate which activities are “commercial or economic.” Bryant, *supra* note 91, at 145-46. All that we know for sure is that violence and gun possession are not economic activities.

¹¹⁶ *Morrison*, 529 U.S. at 615; *see text* accompanying notes 103-07.

¹¹⁷ Neither of the majority opinions in *Lopez* or *Morrison* mentions the Necessary and Proper Clause even once in their analyses. *See Beck*, *supra* note 19, at 584 (noting that the Court did not mention the Necessary and Proper Clause in either *Lopez* or *Morrison* and arguing that it should have).

¹¹⁸ Prior to *Lopez*, the Court had not explicitly distinguished between economic and noneconomic local activities and indicated that *any* activity that had a substantial effect on interstate commerce was within Congress’s commerce authority. *See Wickard v. Filburn*, 317 U.S. 111, 124-25 (1942) (“[E]ven if appellee’s activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial

national police power.¹¹⁹ The question still remained as to what role, if any, the Necessary and Proper Clause played in this analysis.

3. *Gonzales v. Raich* and The Scalia Framework

In its last significant Commerce Clause case prior to *NFIB v. Sebelius*, the Court reaffirmed much of its expansive Commerce Clause precedent without denouncing the recent limitations enunciated in *Lopez* and *Morrison*.¹²⁰ In *Gonzales v. Raich*,¹²¹ the Court addressed whether Congress has the authority to prohibit the local cultivation and use of marijuana that did not enter interstate commerce¹²² as part of a “comprehensive regime” to eliminate the interstate market in illicit drugs.¹²³ Relying heavily on *Wickard*, the Court held that the regulation was constitutional.¹²⁴

The Court began by reaffirming the notion that Congress may regulate purely intrastate activities that have a substantial effect on interstate commerce.¹²⁵ It then noted that, like the wheat produced for personal consumption in *Wickard*, the growth of home-consumed marijuana “affect[s] price and other market conditions” of marijuana and therefore has a substantial effect on interstate commerce.¹²⁶ Finally, the Court emphasized that the proper inquiry is not whether an activity, if undertaken by all people similarly situated, *actually* has a substantial effect on interstate commerce, but only whether Congress

economic effect on interstate commerce.”); see text accompanying note 81. Nevertheless, the Court in *Lopez* and *Morrison* noted that its prior cases all involved economic activity, and that because possession and gender-related violence were not economic activities, the statutes could not be upheld. *United States v. Lopez*, 514 U.S. 549, 560–61 (1995); *Morrison*, 529 U.S. at 613.

¹¹⁹ *Morrison*, 529 U.S. at 615 (arguing that the link between violence and interstate commerce was so attenuated that allowing regulation based on such a tenuous link would “obliterate the Constitution’s distinction between national and local authority”).

¹²⁰ See *supra* Part II.B.2.

¹²¹ *Gonzales v. Raich*, 545 U.S. 1 (2005).

¹²² *Id.* at 5.

¹²³ *Id.* at 12.

¹²⁴ *Id.* at 9.

¹²⁵ *Id.* at 18.

¹²⁶ *Id.* at 19.

had a “‘rational basis’ . . . for so concluding.”¹²⁷ Since Congress had a rational basis for concluding that the defendant’s local cultivation and use of marijuana, combined with others who would also cultivate and use marijuana, would affect the interstate market for that product, the regulation was within Congress’s powers under the Commerce and Necessary and Proper clauses.¹²⁸

The majority differentiated *Raich* from *Lopez* and *Morrison* in two ways. First, the regulation challenged here was one part of a “concededly valid statutory scheme” to restrict the interstate market for illicit drugs, whereas the provisions challenged in *Lopez* and *Morrison* were not enacted to achieve a larger economic objective.¹²⁹ Because the larger regulatory scheme in *Raich* would be “undercut unless the intrastate activity [was] regulated,” this regulation differed significantly from those in *Lopez* and *Morrison*.¹³⁰ Second, unlike the activities in *Lopez* and *Morrison*, the activities regulated here were “the production, distribution and consumption of commodities,” which the Court characterized as “quintessentially economic.”¹³¹ The Court thus distinguished this case from *Lopez* and *Morrison* on the grounds that the regulation was part of a legitimate comprehensive regulatory scheme and regulated a “quintessentially economic” activity.¹³²

Unlike the Court in *Wickard*, the majority in *Raich* explicitly invoked the Necessary and Proper Clause in support of its decision.¹³³

¹²⁷ *Id.* at 22. The Court repeated this language many times throughout the opinion; *id.* at 26 (“Prohibiting the intrastate possession or manufacture of an article of commerce is a *rational* (and commonly utilized) means of regulating commerce in that product.”) (emphasis added); *id.* at 28-29 (“[Congress’s conclusion that homegrown marijuana will affect the market for marijuana] is not only *rational*, but ‘visible to the naked eye’ under any commonsense appraisal of the probable consequences of such an open-ended exemption.”) (emphasis added).

¹²⁸ *Id.* at 22.

¹²⁹ *Id.* at 23.

¹³⁰ *Id.* at 24-25 (citing *United States v. Lopez*, 514 U.S. 549, 561 (1995)).

¹³¹ *Id.* at 25, 26.

¹³² *Id.* at 24-25, 26.

¹³³ Compare *Wickard v. Filburn*, 317 U.S. 111, 119, with *Raich*, 545 U.S. at 5 (“The question presented in this case is whether the power vested in Congress by Article I, § 8, of the Constitution ‘[t]o make all Laws which shall be necessary and proper for carrying into Execution’ its authority to ‘regulate Commerce with foreign Nations, and among the several States’ includes the power to prohibit the local cultivation and use of marijuana in compliance with California law.”), and *id.* at 22 (“Congress was acting well within its authority to

However, it failed to explain what role this clause played in the analysis.¹³⁴ The majority cited the Necessary and Proper Clause twice, once in stating the issue before the Court and once in concluding that the regulation was constitutional.¹³⁵ While the majority's inclusion of the Necessary and Proper Clause in the opinion suggests that it is part of the Commerce Clause framework, the majority's failure to include the Necessary and Proper Clause during its analysis leaves it unclear as to *what*, specifically, the Necessary and Proper Clause adds to the Commerce Clause framework.

However, Justice Scalia, in his concurring opinion, argued that the Necessary and Proper Clause was already incorporated within the third category of the established Commerce Clause framework.¹³⁶ Justice Scalia argued that Congress's authority to regulate intrastate activities that have a substantial effect on interstate commerce derives not from the Commerce Clause itself, but from the Necessary and Proper Clause.¹³⁷ Consistent with this framework, Justice Scalia argued that the key issue when analyzing whether a regulation is necessary and proper to Congress's commerce power is whether the regulation is "essential to a comprehensive regulation of interstate commerce."¹³⁸

'make all Laws which shall be necessary and proper' to 'regulate Commerce . . . among the several States.'") (citation omitted).

¹³⁴ See *Raich*, 545 U.S. at 24-25, 26.

¹³⁵ See *id.*

¹³⁶ *Raich*, 545 U.S. at 34-38 (Scalia, J., concurring in the judgment). The third category of the established Commerce Clause framework allows Congress to regulate activities that have a substantial effect on interstate commerce. *Id.* at 34.

¹³⁷ *Id.* (arguing that intrastate activities that have an effect on interstate commerce "are not themselves part of interstate commerce, and thus the power to regulate them cannot come from the Commerce Clause alone. Rather, [Congress's power to regulate these activities] derives from the Necessary and Proper Clause.").

¹³⁸ *Id.* at 37. It is unclear exactly how strong a relationship between the regulation and the larger economic scheme Justice Scalia would require to justify a regulation under the Necessary and Proper Clause, as he uses different language throughout the opinion to describe this relationship, each suggesting a different level of connection required. At various times throughout the opinion, Scalia uses the terms "necessary," "reasonably adapted" and "essential" when describing the required relationship between the regulation and the regulatory scheme. *Id.* at 37. What is clear is that Scalia supports the Court's proposition from *Lopez* that the Court will not "'pile inference upon inference'" in order to establish that noneconomic activity has a substantial effect on interstate commerce." *Id.* at 36 (quoting *United States v. Lopez*, 514 U.S. 549, 567 (1995)).

Justice Scalia went a step further than the majority opinion, challenging two of the key limitations on the commerce power imposed in *Lopez* and *Morrison*.¹³⁹ Justice Scalia argued that, so long as a regulation is “reasonably adapted”¹⁴⁰ to a legitimate regulatory scheme of interstate commerce, the intrastate activity need not be economic, nor need it, by itself, have a substantial effect on interstate commerce.¹⁴¹ Thus, Justice Scalia views the Necessary and Proper Clause as authorizing Congress to regulate any intrastate activity, whether economic or not, that is “necessary” to make a larger scheme of interstate regulation effective.¹⁴²

The majority opinion in *Raich* did not repudiate the *Lopez* and *Morrison* restrictions, but instead differentiated this case from those prior decisions.¹⁴³ Perhaps ironically, only Justice Scalia’s concurrence suggested a reversal of key parts of the Court’s decisions in *Lopez* and *Morrison*.¹⁴⁴ Justice Scalia, for the first time, explicitly stated what the Court in *Darby* had implied,¹⁴⁵ that the third category of acceptable regulations under the Commerce Clause is derived from the Necessary and Proper Clause.¹⁴⁶

While no other Justice joined Justice Scalia’s concurrence,¹⁴⁷ it is nevertheless important because Scalia offers a potential framework

¹³⁹ *Id.* at 35-37.

¹⁴⁰ *Id.* at 37.

¹⁴¹ *Id.* at 35 (“Where necessary to make a regulation of interstate commerce effective, Congress may regulate even those intrastate activities that do not themselves substantially affect interstate commerce.”). Justice Scalia reiterates this point multiple times in his concurrence. *Id.* at 36 (“[C]ongress’s authority to enact laws necessary and proper for the regulation of interstate commerce is not limited to laws directed against economic activities that have a substantial effect on interstate commerce.”); *id.* at 37 (“The regulation of an intrastate activity may be essential to a comprehensive regulation of interstate commerce even though the intrastate activity does not itself ‘substantially affect’ interstate commerce.”); *id.* at 40 (“That simple possession is a noneconomic activity is immaterial to whether it can be prohibited as a necessary part of a larger regulation.”).

¹⁴² See text accompanying notes 138-41.

¹⁴³ See *supra* Part II.B.3.

¹⁴⁴ See generally *Gonzales v. Raich*, 545 U.S. 1, 33 (2005) (Scalia, J., concurring in the judgment) (arguing that an intrastate activity that Congress regulates need not be economic or commercial in nature).

¹⁴⁵ See *supra* Part II.B.1.

¹⁴⁶ See *supra* Part II.B.1.

¹⁴⁷ *Raich*, 545 U.S. at 4.

that the Court could adopt in analyzing the relationship between the Commerce Clause and the Necessary and Proper Clause. Furthermore, Justice Scalia's emphasis on the requirement that a regulation of intrastate commerce be part of a "larger economic scheme" is supported by a majority of the Court¹⁴⁸ and even finds recognition in *Lopez*.¹⁴⁹ Thus, there exists some common ground around which the Court could form a unified theory of the relationship between the Commerce and Necessary and Proper Clauses.

However, as also seen in *Raich*, and five years later in *Comstock*, the Court was divided as to how strong a connection there must be between the activity regulated and its effects on interstate commerce.¹⁵⁰ While joining in the Court's judgment, Justice Scalia expressed support for the proposition from *Lopez* that the Court will not "'pile inference upon inference'" to find that an intrastate regulation has a substantial effect on interstate commerce.¹⁵¹ This assertion is in tension—if not in complete conflict—with the majority's repeated emphasis on a deferential rational-basis standard for the connection required between the activity regulated and interstate commerce.¹⁵² Furthermore, although Justice Kennedy joined

¹⁴⁸ *Id.* at 22 (The five person majority opinion in *Raich*, which included Justice Kennedy, who joined the majority opinions in *Lopez* and *Morrison*, emphasized that the statute was part of a comprehensive regulatory scheme and wrote that "[a]s we have done many times before, we refuse to excise individual components of [a] larger [economic] scheme"); see also John T. Parry, "*Society Must be [Regulated]*": *Biopolitics and the Commerce Clause in Gonzales v. Raich*, 9 LEWIS & CLARK L. REV. 853, 853 (2005) (writing that "the only clear doctrinal result of the [*Raich*] decision is that pieces of comprehensive regulatory programs will be upheld precisely because they are part of a larger program.").

¹⁴⁹ *United States v. Lopez*, 514 U.S. 549, 561 (1995) (noting that the statute restricting possession of guns in a school zone was not "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated" and that the statute cannot be "sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce").

¹⁵⁰ See text accompanying notes 55-58.

¹⁵¹ *Raich*, 545 U.S. at 36 (Scalia, J., concurring in the judgment) (quoting *Lopez*, 514 U.S. at 567); see also text accompanying note 138.

¹⁵² *Id.* at 22 (stating that the proper inquiry is whether Congress had a "'rational basis'" for concluding that the regulated activity has a substantial effect on interstate commerce"); *id.* at 26 ("Prohibiting the intrastate possession or

the majority opinion in full,¹⁵³ his subsequent concurring opinion in *Comstock* criticizing rational-basis review for Congress's power under the Necessary and Proper Clause suggests that he may not support the majority's lenient standard of review.¹⁵⁴ Thus, prior to *NFIB v. Sebelius*, a majority of the Court seemed to support a more stringent standard of review in Commerce Clause cases than rational basis.

III. *NFIB v. SEBELIUS*

In the Court's decision on the constitutionality of the individual mandate in the Affordable Care Act (ACA),¹⁵⁵ the Necessary and Proper Clause played a distinct, although not prominent, role in the Justices' analyses.¹⁵⁶ Each of the three opinions mentioned the Necessary and Proper Clause specifically and factored it into its analysis.¹⁵⁷ Chief Justice Roberts's opinion focused on the word "proper," concluding that the mandate was not "proper" within the meaning of the clause because it was not an "incidental power" that

manufacture of an article of commerce is a *rational* (and commonly utilized) means of regulating commerce in that product.") (emphasis added); *id.* at 28-29 ("[Congress's conclusion that homegrown marijuana will affect the market for marijuana] is not only *rational*, but 'visible to the naked eye' under any commonsense appraisal of the probable consequences of such an open-ended exemption.") (emphasis added).

¹⁵³ *Raich*, 545 U.S. at 3.

¹⁵⁴ See *United States v. Comstock*, 560 U.S. 126, 150-56 (2010) (Kennedy, J., concurring with the judgment) (criticizing the majority's use of rational-basis review when determining Congress's authority under the Necessary and Proper Clause).

¹⁵⁵ The Affordable Care Act provides that individuals who are not otherwise covered by their employers or the government must purchase private health insurance or make a "shared responsibility payment" to the government. *NFIB v. Sebelius*, 132 S. Ct. 2566, 2580 (2012). The precise amount of the payment is to be determined by the IRS based on the individual's annual income. *Id.* Plaintiffs filed suit, claiming that the government "mandate" was not within Congress's enumerated powers and therefore was unconstitutional. *Id.*

¹⁵⁶ The opinion of Chief Justice Roberts and Justice Ginsburg's dissent both had a separate section in which they considered the mandate under the Necessary and Proper Clause, while the joint concurrence included the clause in the context of the Government's argument that the mandate was "'integral'" to the effectiveness of the ACA and, as such, should be upheld. *NFIB*, 132 S. Ct. at 2579, 2591-93; *id.* at 2625-26 (Ginsburg, J., dissenting in part); *id.* at 2646-47 (Scalia, Kennedy, Thomas, Alito, JJ., concurring in part).

¹⁵⁷ See note 156 and accompanying text.

was “narrow in scope,” but rather was one that taken to its logical extreme, “would work a substantial expansion of federal authority.”¹⁵⁸ Similarly, Justices Scalia, Kennedy, Thomas and Alito, in their joint concurrence, focused on the “principle of enumerated (and hence limited) federal power” and concluded that if the government could mandate citizens buy a product, its power would be “limitless.”¹⁵⁹ Justice Ginsburg’s dissent, on the other hand, focused on the fact that the mandate was “an integral part” of the ACA’s goals to regulate the healthcare market, and therefore the regulation was constitutional in the context of this “complex regulatory program.”¹⁶⁰ All three opinions represented different approaches to defining the role of the Necessary and Proper Clause in the context of Commerce Clause cases.¹⁶¹

A. The Opinion of Chief Justice Roberts

Chief Justice Roberts concluded that the individual mandate was not a “proper” use of federal power and therefore could not be upheld under Congress’s necessary and proper power.¹⁶² After concluding that Congress’s authority under the Commerce Clause did not include the power to compel citizens to buy health insurance,¹⁶³ the Chief Justice

¹⁵⁸ *NFIB*, 132 S. Ct. at 2592 (opinion of Roberts, J.).

¹⁵⁹ *Id.* at 2646 (Scalia, Kennedy, Thomas, Alito, JJ., concurring in part). Justices Scalia, Kennedy, Thomas, and Alito concurred in Chief Justice Roberts’ judgment with regards to the Commerce Clause and the Necessary and Proper Clause issues, but did not join his opinion. *Id.* at 2575. However, they dissented on the Court’s holding that the mandate was constitutional under Congress’s taxing power. *Id.* For ease of reference, this Article refers to this opinion as the “joint concurrence.”

¹⁶⁰ *Id.* at 2625 (Ginsburg, J., dissenting in part). Justice Ginsburg’s opinion, which was joined by Justices Kagan, Breyer, and Sotomayor, concurred in the Court’s opinion that the mandate was constitutional under Congress’s taxing power, but dissented from the Court’s holding that the mandate was unconstitutional under the Commerce Clause and the Necessary and Proper Clause. *Id.* at 2575. For ease of reference, this Article refers to this opinion as “Justice Ginsburg’s dissent.”

¹⁶¹ *See infra* Part III.

¹⁶² *NFIB*, 132 S. Ct. at 2592 (opinion of Roberts, J.).

¹⁶³ *Id.* at 2589-91 (opinion of Roberts, J.). Roberts also rejected the argument raised by the government and supported by Justice Ginsburg’s dissent that because everyone will need healthcare at some time in their life, people are always active in the health care market and, therefore, the mandate regulated current activity rather than compelled participation in it. *Id.* at 2591; *see id.* at 2620 (Ginsburg, J., dissenting in part). Chief Justice Roberts responded that “[t]he Commerce

then turned to the government's argument under the Necessary and Proper Clause.¹⁶⁴ He started his analysis by emphasizing that the clause only allows Congress to exercise powers "incidental" to enumerated powers and not "independent power[s] beyond those specifically enumerated."¹⁶⁵ He then asserted that the mandate would give Congress "the extraordinary ability to create the necessary predicate to the exercise of an enumerated power."¹⁶⁶ This power, he argued, is not "narrow in scope or incidental to the exercise of the commerce power."¹⁶⁷ Thus, while the mandate may be "necessary" for the ACA to work, it is not "proper" and therefore not within Congress's necessary and proper power.¹⁶⁸

B. Joint Concurrence's Opinion

The joint concurrence concluded that because allowing the individual mandate would destroy the federal system of enumerated power, it could not be upheld under the Necessary and Proper Clause.¹⁶⁹ Justices Scalia, Kennedy, Thomas, and Alito concurred with Chief Justice Roberts's holding that the mandate was unconstitutional under the Commerce Clause and Necessary and Proper Clause, but did not join his opinion.¹⁷⁰ Unlike the opinions of Chief Justice Roberts and Justice Ginsburg, the joint concurrence incorporated the Necessary and Proper Clause into its Commerce Clause argument, rather than addressing it separately.¹⁷¹

While addressing the government's argument that the mandate was an essential part of a larger regulatory scheme, the joint concurrence declared that "the Commerce Clause, even when supplemented by the Necessary and Proper Clause, is not *carte blanche* for doing whatever will help achieve the ends Congress seeks by the regulation of

Clause is not a general license to regulate an individual from cradle to grave, simple because he will predictably engage in particular transactions." *Id.* at 2591 (opinion of Roberts, J.).

¹⁶⁴ See *id.* at 2591-92.

¹⁶⁵ *Id.* at 2591.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 2592.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 2647 (Scalia, Kennedy, Thomas, Alito, JJ., concurring in part).

¹⁷⁰ *Id.* at 2575.

¹⁷¹ *Id.* at 2644-46 (Scalia, Kennedy, Thomas, Alito, JJ., concurring in part).

commerce.”¹⁷² The joint concurrence extrapolated this point, arguing that Congress exceeds its necessary and proper power when “the congressional action directly violates the sovereignty of the States” and “when it violates the background principle of enumerated (and hence limited) federal power.”¹⁷³ The joint concurrence concluded that the mandate “represent[s] the expansion of federal power into a broad new field” that would give Congress “limitless” authority.¹⁷⁴ Therefore, because allowing the mandate would destroy the system of enumerated powers, the joint concurrence concluded that it is unconstitutional under the Commerce and Necessary and Proper Clauses.¹⁷⁵

C. Justice Ginsburg’s Opinion

Justice Ginsburg concluded that the individual mandate was constitutional under the Necessary and Proper Clause because it was an “essential part” of a larger regulatory scheme.¹⁷⁶ Similar to Chief Justice Roberts’s opinion, Justice Ginsburg’s dissent¹⁷⁷ begins with a discussion of the constitutionality of the mandate under the Commerce Clause and then further considers it under the Necessary and Proper Clause.¹⁷⁸ After finding that the mandate was constitutional under the Commerce Clause,¹⁷⁹ Justice Ginsburg added that “[w]hen viewed as a component of the entire ACA, the provision’s constitutionality becomes even plainer.”¹⁸⁰ Justice Ginsburg noted that the Court has consistently held that a challenged provision that is an “integral part” of a larger regulatory scheme is constitutional, even if the same act individually would not be within congressional authority.¹⁸¹ Notably,

¹⁷² *Id.* at 2646.

¹⁷³ *Id.*; see also *Printz v. United States*, 521 U.S. 898, 923-24 (1997) (holding that a law is not “Necessary and Proper” if it “violates the principle of state sovereignty reflected in . . . various constitutional provisions”).

¹⁷⁴ *NFIB*, 132 S. Ct. at 2646 (Scalia, Kennedy, Thomas, Alito, JJ., concurring in part).

¹⁷⁵ *Id.* at 2647.

¹⁷⁶ *Id.* at 2652 (Ginsburg J., dissenting in part).

¹⁷⁷ See note 160 and accompanying text.

¹⁷⁸ *NFIB*, 132 S. Ct. at 2618-25 (Ginsburg, J., dissenting in part).

¹⁷⁹ *Id.* at 2625.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 2625-26.

Justice Ginsburg cited Justice Scalia's concurring opinion in *Raich* to support the position that each individual part of a regulatory scheme need not be independently authorized by the Commerce Clause.¹⁸² Justice Ginsburg then noted the important role that the mandate plays in the ACA, allowing Congress to prohibit health insurance companies from withholding coverage from people with preexisting conditions without significantly increasing the cost of health insurance premiums.¹⁸³ As such, she concluded that the mandate is essential to the larger regulation in the ACA and therefore within Congress's powers under the Necessary and Proper Clause.¹⁸⁴

IV. EXPANSIVE OR LIMITING?

The opinions in *NFIB v. Sebelius* suggest two basic directions in which the Court could take its Necessary and Proper Clause jurisprudence. The first approach, reflected in Justice Ginsburg's dissent and mirroring the expansive language from *McCulloch*,¹⁸⁵ views the Necessary and Proper Clause as allowing Congress to enact any law that it could *rationaly* conclude has a substantial effect on interstate commerce *or* is an essential part of a larger scheme that regulates interstate commerce.¹⁸⁶ This "expansive approach" to the Necessary and Proper Clause gives Congress wide, bordering on infinite, latitude to choose the means to reach its regulation of interstate commerce.¹⁸⁷

The other approach, enunciated in Chief Justice Roberts's opinion and the joint concurrence, would limit Congress's powers under the Necessary and Proper Clause to those already granted explicitly in its

¹⁸² *Id.* at 2626 (citing *Gonzales v. Raich*, 545 U.S. 1, 35 (2005) (Scalia, J., concurring)); see *supra* Part II.B.3 (describing Justice Scalia's view on the relationship between the Necessary and Proper Clause and the Commerce Clause).

¹⁸³ *NFIB*, 132 S. Ct. at 2626 (Ginsburg J., dissenting in part) ("Without the individual mandate [the ban on denying coverage to people with pre-existing conditions] would trigger an adverse-selection death-spiral in the health-insurance market; insurance premiums would skyrocket, the number of uninsured would increase, and insurance companies would exit the market.").

¹⁸⁴ *Id.*

¹⁸⁵ See *supra* Part III.C; *supra* Part II.A.

¹⁸⁶ See *infra* Part IV.A.

¹⁸⁷ See *infra* Part IV.A.

commerce power and only such *minor or incidental powers* as may be necessary to enforce its commerce authority.¹⁸⁸ This “limiting approach” would circumscribe congressional authority tightly to its enumerated powers and invalidate any laws that are weakly related to the regulation of interstate commerce and those that are so expansive that they run against the principle of enumerated powers.¹⁸⁹ Neither approach, however, is sufficiently nuanced to balance the competing interests of congressional flexibility and the principle of enumerated powers. Furthermore, neither approach clearly delineates the specific role that the Necessary and Proper Clause plays in the analysis, creating uncertainty for future cases involving the Commerce Clause cases.

A. The Expansive Approach

Two separate, but interacting, ideas form the expansive approach to Congress’s commerce power. The first is that Congress need only have a “rational basis” to conclude that the means it adopts have an appropriate link to an enumerated power.¹⁹⁰ In the context of the Commerce Clause, this requires that Congress offer only a “rational basis” to conclude that any intrastate activity, in the aggregate, has a substantial effect on interstate commerce.¹⁹¹ This approach rejects the requirement that the regulated intrastate activity must be a commercial

¹⁸⁸ See *infra* Part IV.A-B.

¹⁸⁹ See *infra* Part IV.A-B.

¹⁹⁰ *NFIB v. Sebelius*, 132 S. Ct. 2566, 2616 (2012) (Ginsburg, J., dissenting in part) (“When appraising [legislation under the Commerce Clause], we ask only (1) whether Congress had a ‘rational basis’ for concluding that the regulated activity substantially affects interstate commerce, and (2) whether there is a reasonable connection between the regulatory means selected and the asserted ends.”); *Gonzales v. Raich*, 545 U.S. 1, 22 (2005) (“In assessing the scope of Congress’s Commerce Clause authority, the Court need not determine whether respondents’ activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a ‘rational basis’ exists for so concluding.”); *United States v. Comstock*, 560 U.S. 126, 134 (2010) (articulating the standard of review under the Necessary and Proper Clause as whether “the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power”); *United States v. Lopez*, 514 U.S. 549, 617 (1995) (Breyer, J., dissenting) (“[T]he specific question before us . . . is not whether the ‘regulated activity sufficiently affected interstate commerce,’ but, rather, whether Congress could have had ‘a rational basis’ for so concluding.”).

¹⁹¹ See note 190 and accompanying text.

or economic activity.¹⁹² Instead, this approach would permit Congress to pass statutes regulating gun possession in a school zone and gender-motivated violence because Congress could have rationally concluded, through a chain of causation, that these activities would affect interstate commerce.¹⁹³ In the context of the Necessary and Proper Clause specifically, the expansive approach holds that the Court will not invalidate a statute so long as it “constitutes a means that is rationally related to the implementation of a constitutionally enumerated power.”¹⁹⁴ Provided that the Court can find a rational connection between a regulation and an enumerated power, it should not invalidate an act of Congress.¹⁹⁵

The second major theme of the expansive approach is that one piece of a larger regulatory scheme that is not connected directly to an enumerated power will not be excised from that scheme.¹⁹⁶ When a comprehensive regulatory scheme is enacted, it is not necessary that each and every part of that scheme be “‘independently and directly’” related to an enumerated power.¹⁹⁷ So long as the larger scheme would be “undercut” without the lesser provision, the lesser provision is acceptable under the Necessary and Proper Clause.¹⁹⁸

One other expansive approach to the Commerce Clause that finds support in Justice Ginsburg’s dissent is the “collective action” theory.¹⁹⁹ Proponents of this theory argue that the main impetus behind

¹⁹² See *supra* Part II.B.2.

¹⁹³ *Lopez*, 514 U.S. at 618-26 (Breyer, J., dissenting); *United States v. Morrison*, 529 U.S. 598, 628-37 (2000) (Souter, J., dissenting).

¹⁹⁴ *Comstock*, 560 U.S. at 134.

¹⁹⁵ See note 190 and accompanying text.

¹⁹⁶ *NFIB*, 132 S. Ct. at 2625-26 (Ginsburg, J., dissenting in part); *Raich*, 545 U.S. at 23 (“[W]e have often reiterated that where the class of activities is regulated and that class is within the reach of federal power, the courts have no power ‘to excise, as trivial, individual instances’ of the class.”).

¹⁹⁷ *NFIB*, 132 S. Ct. at 2625-26 (quoting *Hodel v. Indiana*, 452 U.S. 314, 329 n.17 (1981)).

¹⁹⁸ *Id.* at 2626 (quoting *Lopez*, 514 U.S. at 561); see also Parry, *supra* note 148 (writing that “the only clear doctrinal result of the [*Raich*] decision is that pieces of comprehensive regulatory programs will be upheld precisely because they are part of a larger program”).

¹⁹⁹ See, e.g., Deborah Jones Merritt, *Textualism and Federalism: The Third Translation of the Commerce Clause: Congressional Power to Regulate Social Problems*, 66 GEO. WASH. L. REV. 1206, 1206 (1998) (arguing that “courts could translate the list of congressional powers in Article I, Section 8 of the

the creation of Congress's enumerated powers in Article I Section 8 was to empower Congress to solve interstate problems that the states could not handle on their own.²⁰⁰ Under this approach, the main inquiry is whether the issue that Congress is addressing is one that the individual states would have difficulty regulating on their own.²⁰¹ If this is true, any regulation that is part of that larger scheme is constitutional under the Necessary and Proper Clause.

The expansive approach gives Congress the flexibility to meet national problems that states are unable to handle, which was one of the driving forces behind the formation of the Constitution.²⁰² Furthermore, its emphasis on giving Congress leeway to pick individual provisions that facilitate a larger regulatory scheme promotes the effective "execution" of congressional enumerated powers. However, this approach places no meaningful limits on congressional authority.²⁰³ Congress could rationally conclude that nearly any activity taken in the aggregate could affect interstate

Constitution to allow Congress to regulate any subject that the states cannot govern effectively on their own" and supporting such a change in the Court's jurisprudence); Donald R. Goodson, *Toward a Unitary Commerce Clause: What the Negative Commerce Clause Reveals About the Commerce Power*, 61 CLEV. ST. L. REV. 745, 790 ("To further economic union, Congress [should be able] to solve collective action problems where a rule of uniformity is needed due to the interstate nature of a given economic activity.").

²⁰⁰ *NFIB*, 132 S. Ct. at 2615 (2012) (Ginsburg J., dissenting in part) (arguing that Constitution was ratified mainly because "the individual States . . . often failed to take actions critical to the success of the Nation as a whole"); see, e.g., Neil S. Siegel, *Distinguishing the "Truly National" from the "Truly Local": Customary Allocation, Commercial Activity, and Collective Action*, 62 DUKE L. J. 797-98 (2012) (arguing that "the Framers drafted Article I, Section 8 primarily to empower Congress to ameliorate serious problems of collective action facing the states"); Merritt, *supra* note 199, at 1210 ("By 1787, the states already had shown that they could not effectively regulate commerce with other nations or among themselves . . . The Framers addressed [this] specific problem[] in Section 8.").

²⁰¹ See notes 199-200.

²⁰² See notes 199-200.

²⁰³ *United States v. Lopez* 514 U.S. 549, 564 (1995) ("If we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate."); *United States v. Morrison*, 529 U.S. 598, 615 (2000) (noting that the link between violence and interstate commerce was so attenuated that allowing regulation based on such a tenuous link would "obliterate the Constitution's distinction between national and local authority.").

commerce,²⁰⁴ and the Court's rational-basis review would permit it to do so.²⁰⁵ This is also true of the expansive approach to larger regulatory schemes. Since only a "rational relationship" is required between the means and the end, any provision could be upheld as peripherally relevant to the larger scheme. The expansive approach's lenient rational-basis review does not tie Congress closely enough to its enumerated powers to make the limitation meaningful.²⁰⁶

B. The Limiting Approach

Both Chief Justice Roberts's opinion and the joint concurrence in *NFIB v. Sebelius* applied a limiting approach to Congress's commerce power.²⁰⁷ However, they represent two separate frameworks for limiting that power.²⁰⁸ The joint concurrence followed the "New Federalism" approach and refused to expand the scope of federal power past the limits established during the New Deal in order to avoid the creation of a national police power.²⁰⁹ Chief Justice Roberts's opinion took an originalist approach, focusing on the word "proper" and arguing for a very limited reading of the Necessary and Proper Clause.²¹⁰ While both approaches place real limitations on congressional power, neither creates a coherent framework that the Court can use going forward.²¹¹

²⁰⁴ See note 203.

²⁰⁵ *Lopez*, 514 U.S. at 564 (noting that if Congress could regulate possession of a gun in a school zone it could completely take over criminal law enforcement and education, areas that have historically been only the province of state governments).

²⁰⁶ See note 203.

²⁰⁷ See *supra* Part III.A (describing Chief Justice Roberts's opinion finding that the individual mandate was not constitutional under the Necessary and Proper Clause); see *supra* Part III.B (describing the joint concurrence's opinion finding that the individual mandate was not constitutional under the Necessary and Proper Clause).

²⁰⁸ Justices Scalia, Kennedy, Thomas, and Alito joined Chief Justice Roberts's judgment that the mandate was unconstitutional under the Commerce Clause and the Necessary and Proper Clause, but did not join his opinion. *NFIB v. Sebelius*, 132 S. Ct. 2566, 2575 (2012).

²⁰⁹ See *infra* Part IV.B.1.

²¹⁰ See *infra* Part IV.B.2.

²¹¹ See generally Part IV.B.1-2 (discussing the problems with the limiting approaches enunciated in Chief Justice Roberts's opinion and the joint concurrence).

1. New Federalism

The limiting approach enunciated in the joint concurrence is primarily concerned with the implications of finding the individual mandate constitutional—mainly that such a ruling would create a national police power.²¹² However, similar to the Court’s rulings in *Lopez* and *Morrison*, the joint concurrence did not directly attack established New Deal precedent that greatly broadened congressional authority.²¹³ Instead, it emphasized that going any further would create a congressional police power.²¹⁴ This reflects what Professor Randy Barnett refers to as the “New Federalism” that emerged from the Rehnquist Court.²¹⁵ According to Barnett, “New Federalism” has two main tenets.²¹⁶ First, New Federalism accepts the increase in federal power that occurred during the New Deal, but insists that any increase in power above that level is unacceptable unless supported by extremely strong justifications.²¹⁷ Second, New Federalism rejects any increase in congressional authority that those Justices believe would result in a congressional police power.²¹⁸

The “New Federalism” reflected by the joint concurrence in *NFIB v. Sebelius* places real limitations on congressional authority without

²¹² *NFIB*, 132 S. Ct. at 2646 (Scalia, Kennedy, Thomas, Alito, JJ., concurring in part) (writing that, “[i]f Congress can reach out and command even those furthest removed from an interstate market to participate in the market, then the Commerce Clause becomes a font of unlimited power”); *id.* (“The mandating of economic activity . . . is a field so limitless that it converts the Commerce Clause into a general authority to direct the economy.”); *id.* at 2647 (noting that at oral arguments the Government was unable to state anything the government could not regulate under its formulation of Congress’s necessary and proper power); *id.* at 2648 (arguing that if the mandate is upheld, “the idea of a limited Government power is at an end”).

²¹³ See text accompanying note 95.

²¹⁴ See *NFIB*, 132 S. Ct. at 2644-48 (Scalia, Kennedy, Thomas, Alito, JJ., concurring in part); Randy E. Barnett, *The New Originalism in Constitutional Law: The Gravitational force of Originalism*, 82 *FORDHAM L. REV.* 411, 428 (2013) (noting that *NFIB* did not raise any arguments about original meaning of the Necessary and Proper or Commerce Clauses or challenge the mandates the act placed on insurance companies, and that the Court based its decision solely on the unprecedented nature of the mandate).

²¹⁵ Barnett, *supra* note 214, at 428-29.

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.* at 429.

undermining the core principles enunciated by the Court since *Darby*.²¹⁹ This limiting approach protects against an unlimited federal power by emphasizing that a federal regulation not authorized under a specific enumerated power must actually “carry into Execution” an enumerated power, and is not creating a new independent authority.²²⁰ Furthermore, it also protects against congressional overreaching, recognizing that any activity can ultimately be connected through a chain of inferences to interstate commerce and requires a reasonable connection between the means and the end of interstate commerce.²²¹

However, the New Federalist approach does not answer perhaps the most important question relating to the Necessary and Proper Clause and Congress’s commerce power—where do we draw the line?²²² The Court has indicated that any power that would lead to the creation of a police power is impermissible, but it has offered no principled way to determine when this line has been crossed.²²³ As Justice Ginsburg noted in her *Sebelius* dissent, any power taken to the extreme can become oppressive.²²⁴ Any step that increases federal power could be seen as one step down the “slippery-slope” to a police power.²²⁵ Thus, while preventing a congressional police power is a

²¹⁹ See text accompanying note 214.

²²⁰ U.S. CONST. art. I, § 8, cl. 18.

²²¹ See text accompanying note 203.

²²² *NFIB v. Sebelius*, 132 S. Ct. 2566, 2627-28 (2012) (Ginsburg, J., dissenting in part) (“How is a judge to decide, when ruling on the constitutionality of a federal statute, whether Congress employed an ‘independent power,’ or merely a ‘derivative’ one? Whether the power used is ‘substantive,’ or just ‘incidental’?”).

²²³ *Id.*

²²⁴ *Id.* at 2625 (noting that “[w]hen contemplated in its extreme, almost any power looks dangerous” and later adding that “the commerce power, hypothetically, would enable Congress to prohibit the purchase and home production of all meat, fish, and dairy goods, effectively compelling Americans to eat only vegetables. Yet no one would offer the ‘hypothetical and unreal possibilit[y],’ of a vegetarian state as a credible reason to deny Congress the authority ever to ban the possession and sale of goods”); see *Champion v. Ames*, 188 U.S. 321, 363 (1903) (“[T]he possible abuse of a power is not an argument against its existence.”).

²²⁵ See Alicia Ouellette, *Health Reform and the Supreme Court: The ACA Survives the Battle of the Broccoli and Fortified Itself Against Future Fatal Attack*, 76 ALB. L. REV. 87, 98 (2012) (calling the argument *NFIB* used, and was largely accepted by the Court, a “classic slippery slope argument”).

proper goal, New Federalism provides no way to determine when the line has been crossed.²²⁶

Additionally, the New Federalist approach is arbitrary to the extent that it is not based in the text of the Constitution. For example, the distinction between local economic and non-economic activity, while a convenient way for the Court to limit federal power without contradicting precedent, is not a distinction supported by the text of the Necessary and Proper Clause.²²⁷ In fact, the clause clearly states that Congress may pass “[a]ll laws which shall be necessary and proper,” not only a certain type or class of laws.²²⁸ Furthermore, why this line? Perhaps, as Barnett suggests, it is the best that the New Federalists can do.²²⁹ Since the New Deal expansion is now settled precedent, the New Federalists are trying to mitigate the damage by preventing further expansion.²³⁰ Nevertheless, drawing an arbitrary line is not the way to create a coherent framework moving forward.

2. “Proper” Congressional Power

Chief Justice Roberts’s formulation of the limiting approach is similar to the joint concurrence’s approach, but rather than focusing solely on general principles of federalism, he justifies his limited reading by focusing on the word “proper.”²³¹ While Chief Justice Roberts offers no authority that directly supports the proposition that an act can be “necessary” but not “proper,” he does cite *Printz v. United States* earlier in that section.²³² In *Printz*, the Court held that the

²²⁶ See text accompanying notes 222-25.

²²⁷ Barnett, *supra* note 214, at 431 (noting that many law professors have criticized the court’s economic noneconomic distinction drawn in *Lopez* and *Morrison* as arbitrary and unrelated to the Constitution’s text).

²²⁸ U.S. CONST. art. I, § 8, cl. 18; *United States v. Lopez*, 514 U.S. 549, 640 (1995) (Souter, J., dissenting) (arguing that a categorical rule prohibiting Congress from regulating noncommercial activity is textually suspect considering that the Necessary and Proper Clause authorizes Congress to enact *all* powers that are necessary and proper).

²²⁹ Barnett, *supra* note 214, at 428-29; see also Beck, *supra* note 19, at 622 (arguing that the economic/noneconomic distinction in *Lopez* and *Morrison* could be viewed “as an interpretation of the Necessary and Proper Clause designed to prevent Congress from employing means remote from its power to regulate interstate commerce”).

²³⁰ See note 229.

²³¹ See *supra* Part III.A; *NFIB v. Sebelius*, 132 S. Ct. 2566, 2591-92 (2012).

²³² *Id.* (citing *Printz v. United States*, 521 U.S. 898, 924 (1997)).

federal government could not compel state officers to enforce federal law.²³³ In responding to the dissent's argument that Congress had authority under the Necessary and Proper Clause to use state officials to enforce federal law,²³⁴ the majority held that because the statute violates the principle of state sovereignty, it was not a "proper" exercise of congressional power.²³⁵

The majority in *Printz* cited no case law to support its claim that a law can be "improper,"²³⁶ but rather referred to an article authored by Professors Gary Lawson and Patricia Granger.²³⁷ In this article, Lawson and Granger argue that when the Necessary and Proper Clause was enacted, the terms "necessary" and "proper" had distinct meanings and thus are not synonymous.²³⁸ For an act to be "proper," it must be one that does not tread on individual rights, state's rights, or the separation of powers.²³⁹ As such, Congress may not "regulate or prohibit activities that fall outside the subject areas specifically enumerated in the Constitution."²⁴⁰ Rather, the Necessary and Proper Clause solely authorizes Congress "to provide enforcement machinery, prescribe penalties, authorize the hiring of employees, appropriate funds, and so forth to effectuate" an enumerated power, not to create new powers to make the enforcement of the enumerated power more efficient.²⁴¹

²³³ *Printz*, 521 U.S. at 935.

²³⁴ *Id.* at 941 (Stevens, J., dissenting).

²³⁵ *Id.* at 924 (majority opinion). The idea that a statute is not "proper" if it violates state sovereignty is also reflected in the joint concurrence's position that the Necessary and Proper Clause does not allow Congress to pass a statute if it violates the principles of state sovereignty or enumerated powers. *See* text accompanying note 173.

²³⁶ 521 U.S. at 924.

²³⁷ Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267 (1993).

²³⁸ *Id.* at 272, 286, 289-97.

²³⁹ *Id.* at 272, 336. Lawson and Granger refer to their approach as the "jurisdictional meaning" of the Necessary and Proper Clause.

²⁴⁰ *Id.* at 331.

²⁴¹ *Id.* ("To carry a law or power into execution in its most basic sense means to provide enforcement machinery, prescribe penalties, authorize the hiring of employees, appropriate funds, and so forth to effectuate that law or power. It does not mean to regulate unenumerated subject areas to make the exercise of enumerated powers more efficient.").

Similar to the New Federalism approach, this approach would impose substantial limitations on Congress's authority.²⁴² However, Lawson and Granger's originalist approach is subject to many of the same criticisms of the New Federalist approach; specifically, when does a regulation cross the line from being an acceptable enforcement mechanism to an impermissible regulation that violates the principles of federalism, individual rights, or the separation of powers?²⁴³ However, assuming the historical veracity of their claims,²⁴⁴ this approach—unlike New Federalism—is supported textually through the use of the word “proper.”²⁴⁵

Nevertheless, this approach has two significant problems of its own. First, it would appear to give Congress little flexibility to deal with modern-day problems.²⁴⁶ Rather, it would only allow Congress the most basic enforcement mechanisms for regulating interstate commerce.²⁴⁷ The second related, and perhaps most daunting, problem with this approach is that it is contrary to the vast majority of the Court's jurisprudence.²⁴⁸ In *McCulloch*, the Court stated the basic principle that the Necessary and Proper Clause gives Congress leeway to choose reasonable means to enforce their enumerated powers.²⁴⁹ Furthermore, the Court, since *Darby*, has expanded the clause well

²⁴² See text accompanying notes 219-21.

²⁴³ See text accompanying notes 222-25.

²⁴⁴ Granger and Lawson admit to “serious flaws in the documentary record,” but nonetheless conclude that these flaws do not undermine their thesis. See Lawson, *supra* note 237, at 334-35. A recent article by Professor John Mikhail challenges Granger and Lawson's argument that the Necessary and Proper Clause, as understood at the time it was written, limited congressional authority to its enumerated powers. John Mikhail, *The Necessary and Proper Clauses*, 102 GEO. L.J. 1045, 1057-58 (2014) (arguing that the enumeration of three distinct Necessary and Proper Clauses suggests that “the Constitution vests the Government of the United States with implied or non-enumerated powers, which go beyond the enumerated powers” and that these implied powers “were part of an original understanding of the Constitution” when drafted 225 years ago). Whether or not Granger and Lawson's historical argument is factually correct is beyond the scope of this Article. Instead, this Article explores what the legal and practical significance of their approach would be.

²⁴⁵ See *supra* Part IV.B.2.

²⁴⁶ See text accompanying note 241.

²⁴⁷ See *id.*

²⁴⁸ See *supra* Part II.B.1

²⁴⁹ See *McCulloch v. Maryland*, 17 U.S. 316 (1819).

beyond what would seem appropriate under this approach,²⁵⁰ requiring an extensive, and very unlikely, change in the Court's jurisprudence. Thus, the originalist approach, proposed by Lawson and Granger and suggested by Chief Justice Roberts, is both too inflexible and too radical to be a viable framework in future Commerce Clause cases.²⁵¹

V. THE MEANS-ENDS FRAMEWORK

In order to define the relationship between the Commerce Clause and the Necessary and Proper Clause, it is important first to delineate the different roles that each plays. Justice Scalia's framework from his concurrence in *Raich* lays a strong foundation for such delineation.²⁵² The Commerce Clause, as one of Congress's enumerated powers, gives Congress direct authority to regulate interstate commerce.²⁵³ As such, the first two categories of the traditional Commerce Clause framework—Congress's ability to regulate the channels and instrumentalities of interstate commerce—derive directly from that enumerated power, as these are “the ingredients of interstate commerce itself.”²⁵⁴ However, a regulation of purely intrastate activities, by definition, is not a regulation of interstate commerce.²⁵⁵ Thus, congressional authority to regulate purely intrastate activities cannot come solely from the Commerce Clause.²⁵⁶

²⁵⁰ See *supra* Part III.B.1.

²⁵¹ *NFIB v. Sebelius*, 132 S. Ct. 2566, 2628-29 (2012) (Ginsburg, J., dissenting in part) (“In the early 20th century, this Court regularly struck down economic regulation enacted by the peoples’ representatives in both the States and the Federal Government. The Chief Justice’s Commerce Clause opinion, and . . . the [joint concurrence’s] reasoning, bear a disquieting resemblance to those long-overruled decisions.”).

²⁵² *Gonzales v. Raich*, 545 U.S. 1, 34-38 (2005) (Scalia, J., concurring in the judgment).

²⁵³ U.S. CONST. art. I, § 8, cl. 3 (giving Congress the authority to “[t]o regulate Commerce . . . among the several states”).

²⁵⁴ *Raich*, 545 U.S. at 34 (Scalia, J., concurring in the judgment).

²⁵⁵ *Id.* (arguing that intrastate activities that have an effect on interstate commerce “are not themselves part of interstate commerce, and thus the power to regulate them cannot come from the Commerce Clause alone. Rather, [Congress’s power to regulate these activities] derives from the Necessary and Proper Clause.”).

²⁵⁶ *Id.*

The Necessary and Proper Clause, in contrast to the Commerce Clause, gives Congress no additional independent authority.²⁵⁷ Rather, it offers Congress the choice of means that are “necessary and proper” to “execute” its enumerated powers.²⁵⁸ Therefore, any power not directly supported by an enumerated power is only permissible if it is used as a means, not an independent end. Since intrastate regulations often may support Congress’s policies with regard to interstate commerce, such regulations may be permissible under the Necessary and Proper Clause.²⁵⁹ Therefore, any congressional regulation of an intrastate activity, while impermissible under the Commerce Clause, may be permissible under the Necessary and Proper Clause.²⁶⁰

In sum, the Commerce Clause only authorizes Congress to regulate interstate commerce directly, while the Necessary and Proper Clause authorizes Congress to enact means to effectuate those regulations. The regulation of intrastate activities can serve as an effective means to enforce a regulation of interstate commerce.²⁶¹ Consistent with this “Means-End Framework,” congressional regulation of intrastate

²⁵⁷ *NFIB*, 132 S. Ct. at 2591 (arguing that the Necessary and Proper Clause “does not license the exercise of any [powers] beyond those specifically enumerated”).

²⁵⁸ U.S. CONST. art. I, § 8, cl. 18; *McCulloch v. Maryland* 17 U.S. 316, 413 (1819) (holding that the Necessary and Proper Clause allows Congress to enact legislation which is a reasonable or “useful” *means* to enforce its enumerated powers); *see also* Beck, *supra* note 19, at 584 (arguing that the Necessary and Proper Clause “regulate[s] the relationship between congressional means and constitutional ends”). *But see* Mikhail, *supra* note 244, at 1054, 1057-58 (arguing that the text and history surrounding the drafting of the Necessary and Proper Clauses imply that Congress is vested with some unenumerated powers, but declining to answer the question of which unenumerated powers it vests with them).

²⁵⁹ *See, e.g., Wickard v. Filburn*, 317 U.S. 111, 128-29 (1942) (finding that regulating the amount of wheat a farmer grew for personal consumption aided in Congress’s attempts to stimulate the market for wheat); *Raich*, 545 U.S. at 19 (finding that prohibiting the production and consumption of marijuana for personal use aided Congress’s regulation of the interstate market for marijuana).

²⁶⁰ *Raich*, 545 U.S. at 34 (Scalia, J., concurring) (“Congress’s regulatory authority over intrastate activities that are not themselves part of interstate commerce . . . derives from the Necessary and Proper Clause.”).

²⁶¹ *See, e.g., Wickard*, 317 U.S. at 128-29 (finding that regulating the amount of wheat a farmer grew for personal consumption aided in Congress’s attempts to stimulate the market for wheat); *Raich*, 545 U.S. at 19 (finding that prohibiting the production and consumption of marijuana for personal use aided Congress’s regulation of the interstate market in marijuana).

activities should only be permissible through the Necessary and Proper Clause if they are a means to enforcing a regulation of interstate commerce.²⁶²

A. Three-Prong Test

Once the role of the Necessary and Proper Clause is defined as providing the means to enforce Congress's enumerated powers, the next question is, what means are permissible? In determining whether an intrastate regulation is permissible under the Commerce and Necessary and Proper Clauses, the Court should adopt a three-part test. This test is a variation on the Court's traditional formulation of intermediate scrutiny.²⁶³ First, the regulation must be part of a larger statutory scheme that predominates over the individual regulation.²⁶⁴ Second, the larger statutory scheme must directly regulate interstate commerce.²⁶⁵ Finally, the regulation must substantially relate to the economic and/or commercial goals of the larger scheme.²⁶⁶ This test emphasizes the role of the Necessary and Proper Clause to provide means to enforce a power, rather than an additional power.²⁶⁷ Furthermore, it gives Congress the flexibility to choose the means of executing its powers without giving it a national police power.²⁶⁸

1. "Carrying into Execution"

Any federal regulation of a purely intrastate activity should be constitutional only if it is part of a larger statutory scheme. The Necessary and Proper clause explicitly ties congressional power to its

²⁶² *Raich*, 545 U.S. at 34 (Scalia, J., concurring).

²⁶³ *See Orr v. Orr*, 440 U.S. 268, 279 (1979) (defining intermediate scrutiny in the context of an equal protection challenge to a gender classification as requiring that the classification serve an important government interest and be substantially related to meeting that objective).

²⁶⁴ *See infra* Part V.A.1.

²⁶⁵ *See infra* Part V.A.2.

²⁶⁶ *See infra* Part V.A.3.

²⁶⁷ *See* text accompanying notes 257-58.

²⁶⁸ *McCulloch v. Maryland*, 17 U.S. 316, 415 (1819) ("[The Necessary and Proper Clause] is . . . in a constitution, intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs."); *see also* *NFIB v. Sebelius*, 132 S. Ct. 2566, 2629 (2012) (Ginsburg, J., dissenting) (arguing that the majority's decision striking down the mandate under the Commerce Clause will "hem in Congress's capacity to meet the new problems arising constantly in our ever-developing modern economy").

enumerated powers; it does not create an additional power.²⁶⁹ A regulation cannot “carry into execution” an enumerated power unless it aids in the effectiveness of an enumerated power. Thus, individual statutes of the sort challenged in *Lopez* and *Morrison* should be *per se* unconstitutional because they simply regulate intrastate activities for their own sake, not in the service of some larger scheme of economic regulation.²⁷⁰ This approach is strongly supported by precedent and a majority of the Court.²⁷¹ While the Justices disagree as to the extent to which a larger regulatory scheme is necessary or sufficient for constitutionality,²⁷² they accept, as a general matter, that a regulation that is part of a larger scheme that regulates interstate commerce is more likely to be a valid exercise of Congress’s enumerated powers.²⁷³

Additionally, it should not suffice that the intrastate regulation is part of a larger statutory scheme; the scheme should predominate over the intrastate regulation. This restriction serves two functions. First, it ensures that the intrastate activity is merely in service of the enumerated power of regulating interstate commerce and is not the predominant end that Congress intends to effect.²⁷⁴ This keeps Congress’s authority on the interstate level in accordance with its enumerated power and restricts it to only such intrastate regulations as may serve that larger scheme.²⁷⁵ Second, it ensures that Congress cannot regulate intrastate commerce merely by including the regulation within a statute that contains some interstate regulations. For example, a federal statute that banned the possession of a gun in a

²⁶⁹ See text accompanying notes 257-58.

²⁷⁰ See *Raich*, 545 U.S. at 23 (distinguishing *Raich* from *Lopez* and *Morrison* by noting that *Lopez* and *Morrison* involved statutes that were wholly independent of a larger statutory scheme regulating interstate commerce, whereas the regulation in *Raich* was part of a “concededly valid statutory scheme”); see also *supra* Part II.B.2.

²⁷¹ See text accompanying notes 147-49.

²⁷² Compare *NFIB v. Sebelius*, 132 S. Ct. 2566, 2592 (2012) (arguing that even if the individual mandate was necessary to the regulatory scheme of the ACA, it was nonetheless improper), with 132 S. Ct. at 2625-26 (Ginsburg, J., dissenting) (arguing that the mandate was clearly constitutional under the Necessary and Proper Clause because it is an essential part of a larger regulatory scheme of interstate commerce).

²⁷³ See text accompanying notes 147-49.

²⁷⁴ *NFIB*, 132 S. Ct. at 2591 (arguing that the Necessary and Proper Clause “does not license the exercise of any [powers] beyond those specifically enumerated”).

²⁷⁵ *Id.*

school zone would not be constitutional simply because a separate provision of the same statute provided for funding for the interstate highway system.²⁷⁶ The larger economic scheme must predominate, with the intrastate regulation as a mere tool toward the effectiveness of that regulation.

2. “An Enumerated Power”

Consistent with the Means-Ends Framework, the larger scheme itself must regulate interstate commerce. This provides the enumerated “end” that is the necessary prerequisite for a regulation justified by the Necessary and Proper Clause.²⁷⁷ If the scheme does not further an objective that is economic or commercial in nature, then there is no enumerated power on which to anchor the Necessary and Proper Clause, and, therefore, that individual regulation cannot be sustained under that power.²⁷⁸

3. Substantially Related

The Court has long struggled over what degree of connection is required between a law and an enumerated power to be justified under the Necessary and Proper Clause.²⁷⁹ While the Court since *McCulloch* has recognized that the regulation need not be essential,²⁸⁰ many Justices have criticized the lenient rational-basis review that the Court has frequently applied.²⁸¹ The application of an intermediate scrutiny

²⁷⁶ There would also be an issue as to whether the regulation is “substantially related” to a larger economic scheme. This issue will be addressed more fully, *infra* Part V.A.3.

²⁷⁷ See text accompanying notes 257-58.

²⁷⁸ U.S. CONST. art. I, § 8, cl. 18 (giving Congress the authority “To make all laws which shall be necessary and proper for carrying into execution” its enumerated powers).

²⁷⁹ See *supra* Part II.A.

²⁸⁰ *McCulloch v. Maryland*, 17 U.S. 316, 413, 416 (1819).

²⁸¹ See *United States v. Comstock*, 560 U.S. 126, 151-52 (2010) (Kennedy, J., concurring in the judgment) (arguing against the majority’s use of a lenient form of rational-basis review when analyzing a statute under the Necessary and Proper Clause); 560 U.S. at 158 (Alito, J., concurring in the judgment) (“Although the term ‘necessary’ does not mean ‘absolutely necessary’ or indispensable, the term requires an ‘appropriate’ link between a power conferred by the Constitution and the law enacted by Congress.”); see also *United States v. Lopez*, 514 U.S. 549, 567 (1995) (stating that the Court will not “pile inference upon inference” to find a connection between an intrastate regulation and interstate commerce).

standard, which requires that the means “substantially relate[]” to an enumerated power,²⁸² would resolve this issue by giving Congress leeway to choose reasonable means, while forbidding regulations with the remotest of connections to interstate commerce.

Intermediate scrutiny has been most commonly applied in equal-protection cases involving classifications based upon gender.²⁸³ The precise meaning of “substantially relate” is far from clear, and many have criticized the standard.²⁸⁴ However, intermediate scrutiny is the best standard of review in this situation for two main reasons. First, it constitutes a middle ground between the lenient rational basis standard, criticized by many of the Justices, and a strict scrutiny standard rejected in *McCulloch*,²⁸⁵ which would handcuff Congress to only means that are “narrowly tailored”²⁸⁶ or “absolutely necessary.”²⁸⁷ Second, the standard is firmly entrenched in Supreme Court jurisprudence and supported by case law.²⁸⁸ Thus, despite the

²⁸² *Orr v. Orr*, 440 U.S. 268, 279 (1979).

²⁸³ Norman T. Deutsch, *Nguyen v. INS and the Application of Intermediate Scrutiny to Gender Classifications: Theory, Practice, and Reality*, 30 PEPP. L. REV. 185, 186 (2003) (noting that “[a]ll of the justices agreed that the statute created a gender classification and intermediate scrutiny was the appropriate standard of review”) (citing *Nguyen v. INS*, 533 U.S. 53, 60-61, 74-75 (2001)).

²⁸⁴ *See, e.g.*, Kimberly J. Jenkins, *Constitutional Lessons for the Next Generation of Public Single-sex Elementary and Middle Schools*, 47 WM. & MARY L. REV. 1953, 2036 (2006) (arguing that intermediate scrutiny is unpredictable and attempting to “systematize intermediate scrutiny in the context of single-sex public schools”); Deutsch, *supra* note 283, at 186, 187 (arguing that the application of intermediate scrutiny to gender classifications “continues to be troublesome” and that “[i]n reality, intermediate scrutiny in gender cases is a form of rational-basis review”).

²⁸⁵ *See generally* *McCulloch v. Maryland*, 17 U.S. 316 (1819) (rejecting an interpretation of the Necessary and Proper Clause that would require that a Congressional regulation supported by that clause be “absolutely necessary” to enforcing an enumerated power).

²⁸⁶ Strict scrutiny requires the government to show that its regulation is narrowly tailored to a compelling government interest. *See, e.g.*, *Johnson v. California*, 543 U.S. 499, 505 (2005) (applying strict scrutiny in the context of an equal protection challenge to a racial classification); *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 813 (1999) (applying strict scrutiny in the context of a content-based restriction on speech).

²⁸⁷ *McCulloch*, 17 U.S. at 414.

²⁸⁸ The first case to apply intermediate scrutiny to gender classifications was *Craig v. Boren*. 429 U.S. 190 (1976). Since 1982, intermediate scrutiny “has been the

uncertainty surrounding when a means is “substantially related,”²⁸⁹ the Court has a familiar framework and applications of that framework to draw from.

This approach rejects a *per se* distinction between regulations of “economic and non-economic” activity or between regulations of “activity” and “inactivity” for a number of reasons. First, these classifications are difficult to make and, in many circumstances, make no meaningful difference.²⁹⁰ Second, such delineations are unnecessary under this approach to prevent a congressional police power. These distinctions were made as part of the “New Federalist” movement in the Court, which sought to prevent further expansion of congressional power toward a police power.²⁹¹ The requirement that a regulation be part of a larger scheme and substantially relate to that scheme limits Congress’s discretion to choose means that bear a substantial relationship to their enumerated power.²⁹² Thus, it is unnecessary to draw an arbitrary line between regulations of activity and inactivity or economic and non-economic activities. Finally, and perhaps most importantly, such limitations are not supported by the text of the Constitution.²⁹³ The Necessary and Proper Clause allows Congress to pass “*all* laws which are necessary and proper,” not “laws of economic activities.”²⁹⁴ Thus any intrastate regulation, so long as it

consistent standard of a majority of the Court” in equal protection challenges to gender classifications. *See* Deutsch, *supra* note 283, at 195.

²⁸⁹ *See* note 284.

²⁹⁰ *NFIB*, 132 S. Ct. 2566, 2626 (2012) (Ginsburg, J., dissenting) (arguing that the courts and Congress will have difficulty “distinguishing statutes that regulate ‘activity’ from those that regulate ‘inactivity’”); *Lopez*, 514 U.S. at 629 (Breyer, J., dissenting) (arguing that it is difficult to distinguish between economic and noneconomic activities).

²⁹¹ *See* text accompanying notes 214-18, 228-32.

²⁹² *See supra* Part V.A.1-2.

²⁹³ Siegel, *supra* note 200, at 819 (arguing that activity-inactivity distinction is not supported by the text of The Commerce Clause); Barnett, *supra* note 214, at 431 (noting that many law professors have criticized the Court’s economic-noneconomic distinction drawn in *Lopez* and *Morrison* as arbitrary and unrelated to the Constitution’s text); *Lopez*, 514 U.S. at 604 (Souter, J., dissenting) (arguing that a categorical rule prohibiting Congress from regulating noncommercial activity is textually suspect considering that the Necessary and Proper Clause authorizes Congress to enact *all* powers that are necessary and proper).

²⁹⁴ U.S. CONST. art. I, § 8, cl. 18; *see* note 293.

substantially relates to a larger scheme that regulates interstate commerce, should be permissible under the Necessary and Proper Clause.²⁹⁵

B. Implementation

Once there is a theoretical framework for the relationship between the Commerce Clause and the Necessary and Proper Clause—the Means-Ends Framework²⁹⁶—and a test that reflects that framework,²⁹⁷ the next step is to determine the best way to implement that test. First, it is important to note that the Means-Ends Framework does not create a bright-line rule. Due to the complexity of the issues and the competing values involved, a measure of judicial discretion is inevitable to find the proper balance between the principle of limited powers and congressional flexibility to fix the means to reach its enumerated ends. Furthermore, what means will effectively aid Congress in its regulation of interstate commerce will inevitably change over time with societal and technological developments.²⁹⁸ As such, a bright-line rule is inappropriate in this context.

However, drawing from Professor J. Randy Beck’s work, *The New Jurisprudence of the Necessary and Proper Clause*, this Article proposes two major tools that the Court could use in applying the Means-Ends Framework.²⁹⁹ The Court should examine (1) whether Congress is really using an intrastate regulation to pursue an enumerated end or if it is simply using that as a pretext to bring about an end outside its authority,³⁰⁰ and (2) whether the regulation directly supports an enumerated power, or if it only does so through “numerous

²⁹⁵ See text accompanying notes 257-60.

²⁹⁶ See *supra* beginning of Part IV.

²⁹⁷ See *supra* Part IV.A.

²⁹⁸ *NFIB v. Sebelius*, 132 S. Ct. 2566, 2629 (2012) (Ginsburg, J., dissenting) (arguing that the majority’s decision striking down the mandate under the Commerce Clause will “hem in Congress’s capacity to meet the new problems arising constantly in our ever-developing modern economy”); see also *McCulloch v. Maryland*, 17 U.S. 316, 415 (1819) (“[The Necessary and Proper Clause] is . . . in a constitution, intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs.”).

²⁹⁹ Beck, *supra* note 19, at 612-13.

³⁰⁰ *Id.*; see *infra* Part V.B.1 (describing the application of this tool in more detail).

intermediate or intervening causes.”³⁰¹ The issues of “pretext” and “directness” would ensure that the intrastate regulation is actually a means to a larger regulation of interstate commerce, and that the intrastate regulation substantially relates to that scheme.³⁰²

1. Pretext

An analysis of congressional motivations in enacting a regulation of intrastate commerce would help the Court determine whether the larger statutory scheme actually regulates interstate commerce and whether the regulation of intrastate commerce is substantially related to that scheme.³⁰³ When making this inquiry, the Court should consider the regulation both objectively and subjectively; whether a reasonable legislator would view the intrastate regulation as means to bring about an enumerated end and whether the legislators who enacted the law sincerely believed that the intrastate regulation would bring about an enumerated end. This analysis ensures that, consistent with the Means-End Framework, Congress is using the Necessary and Proper Clause as a means to an enumerated power, not as a pretext to reach an end outside out of its authority.

³⁰¹ Beck, *supra* note 19, at 612-13; *see infra* Part V.B.2 (describing the application of this tool in more detail). Beck also argues that a regulation under the Necessary and Proper Clause must be “plainly adapted,” which he defines as a regulation that does “not require a sophisticated explanation.” Beck, *supra* note 19, at 613. Such a requirement may be relevant in certain cases—if a sophisticated explanation is needed to explain the many intervening causes that connect the regulation to interstate commerce. However, the requirement sweeps too broadly. Considering the growing complexity of society and technology, a means may directly aid in an interstate regulation, but still require a sophisticated explanation. *See* text accompanying note 298. As such, a requirement that an intrastate regulation be “plainly adapted” to an enumerated power, as Beck defines it, does not strongly serve the goals of the Means-Ends Framework.

³⁰² This is not meant to be an exhaustive list. Rather, it is illustrative of tools the Court *could* use to help them analyze an intrastate regulation under the test proposed in Part V.A. Other factors that the Court may want to consider when applying the three-prong test include: how vital the intrastate regulation is to the proper functioning of the interstate regulation, whether Congress considered other less-intrusive means to reach the same the goal, and whether the intrastate regulation aids in the functioning of a key part of the interstate regulation or merely something peripheral to the overall scheme.

³⁰³ *See supra* Part V.A.2-3.

The Court would first analyze whether a reasonable legislator would view the intrastate regulation as likely to aid in a regulation of interstate commerce.³⁰⁴ The Court frequently employs an objective “reasonable person” analysis, making it a familiar tool for the Court to apply in this context.³⁰⁵ The Court would examine the intrastate regulation in relation to the larger economic scheme and ask, “would a [reasonable] legislator who honestly wanted to achieve a legitimate end within the scope of the enumerated powers really expect this measure” to aid in the execution of that enumerated power?³⁰⁶ If the answer is “yes,” then it is more likely that the regulation truly is a means to an enumerated end, and that it is substantially related to that end.³⁰⁷

Next, the Court should explore the actual subjective purpose of the legislators who enacted the regulation and determine whether they intended the intrastate regulation to be a means to a regulation of interstate commerce or if the intrastate regulation was the end they desired to achieve.³⁰⁸ While attempts to determine congressional purpose have been criticized by some,³⁰⁹ it is a tool that the Court has

³⁰⁴ Beck, *supra* note 19, at 612.

³⁰⁵ See e.g., *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 866 (2005) (applying a reasonable person test to determine whether a picture of the Ten Commandments in a county courthouse violated the establishment clause); *Florida v. Bostick*, 501 U.S. 429, 435 (1991) (applying a reasonable person test to determine whether a person has been seized under the Fourth Amendment); *Pope v. Illinois*, 481 U.S. 497, 501 (1987) (applying a reasonable person test to determine whether a work has “serious literary, political, artistic, or scientific value” when applying the *Miller* test for allegedly obscene material).

³⁰⁶ Beck, *supra* note 19, at 612.

³⁰⁷ See *supra* Part V.A.2-3.

³⁰⁸ Beck explicitly rejects an approach that would analyze the “subjective good faith on the part of a large number of legislators.” Beck, *supra* note 19, at 612. However, for the reasons set forth in this paragraph, I believe such an inquiry, in addition to an objective analysis, may be useful in some cases.

³⁰⁹ See, e.g., *Edwards v. Aguillard*, 482 U.S. 578, 638 (1987) (Scalia, J., dissenting) (arguing that “discerning the subjective motivation of those enacting [a] statute is . . . almost always an impossible task”); Robert Farrell, *Legislative Purpose and Equal Protection’s Rationality Review*, 37 VILL. L. REV. 1, 2 (1992) (arguing that disagreement among the justices as to what constitutes “purpose” has led to “an inconsistent and unpredictable body of case law”). But see *McCreary County*, 545 U.S. at 861-62 (noting that courts frequently inquire into the purpose of a government act and arguing that it must be a useful exercise,

frequently used in other areas of the law.³¹⁰ If Congress's predominant purpose was to regulate the intrastate activity and not interstate commerce, then it is likely that the regulation of interstate commerce does not predominate over the intrastate regulation.³¹¹ To determine legislative purpose, the Court has considered factors such as the legislative history of the statute³¹² and "the specific sequence of events leading up to the challenged decision."³¹³ Despite the criticisms of determining Congressional purpose, it would be an important tool in some cases to help the Court determine whether the intrastate regulation is genuinely being used as a means to an enumerated end.

otherwise "the whole notion of purpose in law would have dropped into disrepute long ago").

³¹⁰ *McCreary Cnty.*, 545 U.S. at 861 (writing that "governmental purpose is a key element of a good deal of constitutional doctrine"); *City of Indianapolis v. Edmond*, 531 U.S. 32, 46-47 (2000) (writing that "courts routinely engage in [a purpose inquiry] in many areas of constitutional jurisprudence as a means of sifting abusive governmental conduct from that which is lawful"); *see, e.g., McCreary Cnty.*, 545 U.S. at 881 (finding that the government had a purpose to promote religion based on the history of the plan to add a Ten Commandments statute to a courthouse in violation of the Establishment Clause); *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977) (finding that a facially neutral law that had a discriminatory effect on African Americans did not have a discriminatory purpose and therefore did not violate the equal protection); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992) (plurality opinion) (declaring that a provision regulating abortion is unconstitutional "if its purpose or effect is to place a substantial obstacle in the path of a woman seeking abortion").

³¹¹ *See supra* Part V.A.3.

³¹² Many judges, following the lead of Supreme Court Justice Antonin Scalia, refuse to look at the legislative history of a statute. Nicholas R. Parrillo, *Leviathan and Interpretive Revolution: The Administrative, The Judiciary, and the Rise of Legislative History, 1890-1950*, 123 YALE L.J. 266, 269 (2013). Justices who refuse to look at legislative history could still use the Means-Ends approach and focus solely on the objective relationship between the statute and an enumerated power and the context in which the bill was passed. *See* text accompanying notes 304-07. Legislative history, while a useful tool in the Means-Ends Framework, is not indispensable to its application. Therefore, this approach can still be applied successfully by "textualist" judges.

³¹³ *Arlington Heights*, 429 U.S. at 267. For example, in *McCreary County*, the town first displayed a large Ten Commandments picture in its courthouse and then changed the display two times to include other historical documents and the Ten Commandments. 545 U.S. at 851-58. The Court held that the original display, despite the subsequent changes, showed that the town had a purpose to endorse religion in violation of the Establishment Clause. *Id.* at 873-74.

2. Directness

To further help determine whether the intrastate regulation substantially relates to the larger economic scheme,³¹⁴ the Court should also examine how directly the intrastate regulation aids in the execution of the larger scheme.³¹⁵ If the intrastate regulation only aids the larger scheme through a chain of causation or through “numerous intermediate or intervening causes,” then it is less likely that the intrastate regulation is substantially related to the scheme.³¹⁶ Since “directness” is a term of degree, there is no bright-line rule to determine how direct the connection between the means and end must be to substantially relate.³¹⁷ However, the more steps that are required to show that the intrastate regulation supports the larger scheme, the less likely it is permissible under the Necessary and Proper Clause.³¹⁸

VI. CONCLUSION

Inquiries into “context” and “directness” are just two methods the Court could use to apply the Means-Ends Framework to ensure that the Necessary and Proper Clause provides only the means to the execution of an enumerated power and not an additional end.³¹⁹ Over time, Congress’s commerce power has become its most expansive

³¹⁴ See *supra* Part V.A.3.

³¹⁵ See Beck, *supra* note 19, at 611-12. While the Court in *Wickard* clearly rejected a distinction between regulations with direct and indirect effects on interstate commerce, see text accompanying note 80, the Court’s holdings in *Lopez* and *Morrison*, where it refused to “pile inference upon inference” to find a connection between an intrastate regulation and interstate commerce, suggest that the Court still considers relevant how direct the connection is between the means employed and the enumerated end.

³¹⁶ See Beck, *supra* note 19, at 612.

³¹⁷ *Id.*

³¹⁸ *Id.*

³¹⁹ See *supra* Part V.A (laying out the three-prong test for the Means-Ends Framework as (1) the regulation must be part of a larger statutory scheme that predominates over the individual regulation; (2) the legislative scheme must regulate interstate commerce; and (3) the regulation must substantially relate to the goals of the economic scheme); see note 302 (describing other factors that the Court might consider when applying the three-prong test of the Mean-End Framework).

power.³²⁰ Only by directly and explicitly addressing the Necessary and Proper Clause can the scope of federal power be definitively determined.³²¹ The consistent tension in Commerce Clause cases has been between giving Congress flexibility to address the problems of the nation, while at the same time maintaining a federal government of limited and enumerated powers.³²² This dilemma provides no easy bright-line solution and, like many other constitutional issues, will often turn on a case-by-case determination.

The best way to make such a determination and to balance the competing interests of flexibility and limited government is to focus on the means-ends relationship between a particular regulation and a larger economic scheme.³²³ The Commerce Clause refers only to direct regulation of interstate commerce, and therefore congressional power under that Clause should be limited to direct control of those issues.³²⁴ The Necessary and Proper Clause provides Congress flexibility to select the means to meet its larger goals, but does not function as an additional enumerated power.³²⁵ The Necessary and Proper Clause imposes no limitations on what can be regulated, so long as it “executes” an enumerated power.³²⁶ Thus the Court’s distinctions between regulations of “activity and inactivity” and between “economic and non-economic” regulations are unsupported by the text.³²⁷

³²⁰ Elizabeth Bondurant & Steven D. Henry, *Constitutional Challenges to the Patient Protection and Affordable Care Act*, 78 DEF. COUNS. J. 249, 250 (2011); Josie George Richardson, Note, *Constitutional Law—Commerce Clause—Let them Eat . . . Broccoli?* 35 U. ARK. LITTLE ROCK L. REV. 559, 585 (2013).

³²¹ See Beck, *supra* note 19, at 581 (“Because the Necessary and Proper Clause represents the outer boundary of congressional authority, consideration of this provision necessarily illuminates discussions of state sovereignty and reserved powers.”).

³²² See *supra* Part II.A (describing the tension in *McCulloch* between the fact that Congress is limited to its enumerated power and that Congress should have significant leeway to pick the means to enforce those powers).

³²³ See *supra* Part V.

³²⁴ See *supra* Part IV.

³²⁵ See *supra* Part IV.

³²⁶ U.S. CONST. art. I, § 8, cl. 18 (giving Congress the power “to make *all laws* which shall be necessary and proper for carrying into execution” its enumerated powers) (emphasis added).

³²⁷ See *supra* Parts IV.B.1, V.A.3.

Recognizing that the Necessary and Proper Clause provides means, and not an additional end in itself, its proper role should be in direct aid of an enumerated power.³²⁸ As such, any intrastate regulation should be upheld only if it is predominated by a larger economic scheme and is substantially related to the regulation of interstate commerce.³²⁹ This approach allows the Necessary and Proper Clause to play its intended role of providing flexible means, without allowing it to impermissibly extend congressional power to the functional equivalent of a national police power.

³²⁸ See *supra* Part IV.

³²⁹ See *supra* Part V.